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VOLUME XIII.

**REPORTS OF CASES DECIDED IN THE QUEEN'S
BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS**

HIGH COURT OF JUSTICE FOR ONTARIO,

EDITOR :
JAMES F. SMITH, Q. C.

QUEEN'S BENCH DIVISION.....S. J. VANKOUGHNET, Q.C.
CHANCERY DIVISION { A. H. F. LEFROY,
{ GEORGE A. BOOMER,
COMMON PLEAS DIVISION GEORGE F. HARMAN,

BARRISTERS-AT-LAW.

1887.

THE DEPARTMENT
OF AGRICULTURE
AND RURAL AFFAIRS
CANADA

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ENTERED according to Act of Parliament of Canada, in the year of our Lord
one thousand eight hundred and eighty-seven, by THE LAW SOCIETY OF UPPER
CANADA, in the Office of the Minister of Agriculture.

J U D G E S
OF THE
HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

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HON. ADAM WILSON, C. J.
" **JOHN DOUGLAS ARMOUR, J.**
" **JOHN O'CONNOR, J.**

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MEMORANDA.

On the 11th of February, A. D., 1887, THOMAS ROBERTSON, one of Her Majesty's Counsel, was appointed a Judge of the Supreme Court of Judicature for Ontario.

On the same day the Honourable THOMAS ROBERTSON, a Judge of the Supreme Court of Judicature for Ontario, was appointed a Justice of the High Court of Justice for Ontario.

On the same day the Honourable THOMAS ROBERTSON, a Justice of the High Court of Justice for Ontario, was appointed a Member of the Chancery Division of the High Court of Justice for Ontario.

On the 9th of May, A.D., 1887, the Queen was pleased to confer the honour of Knighthood on the Honourable MATTHEW CROOKS CAMERON, Chief Justice of the Common Pleas Division of the High Court of Justice for Ontario.

On the 25th of June, A. D., 1887, the Honourable Sir MATTHEW CROOKS CAMERON, Chief Justice of the Common Pleas Division of the High Court of Justice for Ontario, died at the City of Toronto.

ERRATA.

Page 8, line 4 from bottom of head note, for "perjury" read "forgery."

Page 299, line 7 from bottom, for "proposed" read "prepared."

Page 600, line 8 from top of head note, insert the word "paid" after the word "not," and line 4 from bottom of head note, strike out the word "not."

REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS.

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[QUEEN'S BENCH DIVISION.]

REGINA V. JOHNSON.

*Canada Temperance Act, 1878—Information laid before one magistrate—
Conviction quashed.*

*Held, following Regina v. Ramsay, 11 O. R. 210, that a conviction under
the Canada Temperance Act 1878, upon an information laid before one
magistrate only, was bad, and must be quashed.*

Aylesworth obtained an order *nisi* to quash a conviction
under the Canada Temperance Act, 1878, upon the ground,
amongst others, (1.) that the information was laid before
one magistrate instead of two.

Clement shewed cause.

January 18, 1887. O'CONNOR, J.—I think the first ob-
jection stated in the order *nisi* in this case is fatal to the
conviction. There seems a conflict of decisions between
two recent cases.

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In the first of these, *Regina v. Klemm*, 10 O. R. 143, the learned Chief Justice of the Queen's Bench Division appears to have held that one magistrate may take the information in cases under the Canada Temperance Act, 1878, though two are required to try the case.

The objection was, indeed, properly taken, *i. e.*, taken in proper form, in the order *nisi*, in that case; but I am inclined to think that his attention was not directed to the difference between the information and the summons, as made in section 105 of the Act. I infer this from the Chief Justice's expression at the commencement of his judgment.

The second case, *Regina v. Ramsay*, 11 O. R. 210, was decided since by Mr. Justice Galt, to whom the former case was cited and relied upon as authority for sustaining the conviction; but notwithstanding that he decided that the objection was fatal to the conviction.

It seems to me that my brother Galt has correctly interpreted the section 105, above mentioned. This conviction must therefore be quashed, and, as in *Regina v. Ramsay*, without costs. As this disposes of the conviction, it is unnecessary to consider the other objections stated in the order *nisi*.

Conviction quashed.

[COMMON PLEAS DIVISION.]

IN RE THE REVISION OF THE VOTERS' LIST FOR THE CITY
OF ST. THOMAS FOR THE YEAR 1886.

RE ALEXANDER BOYES.

Voters' List Act—Order for holding Court before expiration of thirty days allowed for appeals—Jurisdiction—Prohibition—High Court—Power to interfere.

The voters' lists for the city of St. Thomas were posted up in the office of the city clerk, on 23rd October, 1886. On 19th November, three days before the time for giving, by a voter, notice of any complaint against the list, had expired, the clerk made a report to the County Judge in the form No. 7 in the schedule to the Voters' List Act, R. S. O. ch. 9; and the said Judge thereupon, on said 19th November, made an order appointing the 30th November, 1886, for the holding of a Court to hear complaints of errors and omissions in the said voters' lists, and notice of the time and place thereof was duly published in a newspaper published in said city. Previous to the 19th November, notice of a number of complaints of errors and omissions in the list was given to the clerk. On an application for a writ of prohibition to prohibit the County Judge from holding the Court, on the ground that he had no jurisdiction to make the order, inasmuch as the thirty days for filing appeals had not then expired.

Held, that the County Court Judge had jurisdiction to make the order; and the application was therefore refused, with costs.

Per CAMERON, C. J.—The appeal or complaint made within the thirty days after the clerk has posted the voters' list would be in time, and should be disposed of, whether made after the order for holding the Court or not; but *quære*, whether the Judge could deal with such appeals on the 30th November Court.

Per CAMERON, C. J.—*Quære*, also whether this Court has the right to interfere with election officers, except where express statutory power to do so is given.

Per ROSE, J.—Under the Voters' List Act, the Judge is not confined by the report of the clerk, but may and should hear all appeals.

THIS was an application made on behalf of Alexander Boyes, pursuant to notice of motion, to the Honorable Mr. Justice Armour presiding in Chambers, and by him referred to this Court, for a writ of prohibition directed to John McLean, Esquire, Deputy Judge of the county of Elgin, to prohibit him from proceeding to hold a Court for the revision of the voters' list for the city of St. Thomas for the year 1886, on the 30th day of November instant, pursuant to an order made by the said Deputy Judge in that

behalf, on the ground that he had no jurisdiction to make the said order for holding the said Court, inasmuch as the thirty days allowed by law for filing appeals against the said list had not expired when the order was made.

From the affidavits and papers filed it appeared that the voters' list in question was posted up in the office of the clerk of the municipality of the city of St. Thomas on the 23rd day of October, 1886: that on the 19th day of November, 1886, three days before the time for giving, by a voter, notice of any complaint he might intend to make against the list, had expired, the clerk of the said municipality made a report to the said Judge in the form No. 7 in the schedule to the Voters' List Act, R. S. O. ch. 9, and the said Judge thereupon, on the said 19th day of November, made an order appointing the 30th day of November, 1886, for the holding of a court to hear complaints of errors and omissions in the said voters' list. Notice of the time and place of holding the said Court was duly published in the St. Thomas Daily Times, a newspaper published in the city of St. Thomas.

Previous to the 19th November, 1886, a number of complaints had been made to the clerk by notice; and subsequently, on the 22nd day of November, notice of a large number of complaints of errors and omissions in the list was given to the said clerk.

Colin McDougall, Q. C., supported the motion, and referred to R. S. O. ch. 49, secs. 7, 9; Forms 7, 8, 10, 12; 48 Vic. ch. 3, sec. 10 (O.); R. S. O. ch. 180, secs. 50, 64; *Tobey v. Wilson*, 43 U. C. R. 230.

Ermatinger, Q. C., contra, referred to *Re McLean v. McLeod*, 5 P. R. 467, 470; *Re Lincoln Election*, 2 A. R. 316, 321, 2; *High's Extraordinary Legal Remedies*, 2nd ed., p. 606, 608; *Re Simpson and County Judge of Lanark*, 9 P. R. 358; *Re Voters' Lists of L'Orignal*, 9 P. R. 425.

November 29, 1886. CAMERON, C. J.—By the Voters' List Act there is no direction to the County Court Judge

as to the time of holding a Court to hear appeals against the lists except that contained in sec. 9, which limits the time within which complaints must be made and directs, after notice of a complaint has been given to the clerk, the proceedings by the clerk, judge, and parties respectively are to be the same, or as nearly as may be the same, as in the case of an appeal from the Court of Revision. But by sec. 10 of the Voters' List Amendment Act of 1885 the following sub-section is appended to sec. 9: "(3) No Judge shall proceed with the holding of any Court for hearing complaints as aforesaid, unless and until notice (Form 10) of the time and place of holding said Court shall by the clerk have been published at least ten days before the sittings of such Court, in some newspaper published in the municipality, or, if there be no such paper, then in some newspaper published in the nearest municipality in which one is published."

By the said sec. 9 of the original Act, and sec. 10 of the amending Act, all that is essential to give the Judge jurisdiction to hold a Court is a complaint to the clerk, and a report by the clerk in the form 7, or to the like import, that notice of complaints has been given, such Court not to be less than ten days after notice of the time and place of holding such Court has been published as above indicated.

In the present case all these preliminaries have been observed, therefore the Judge has jurisdiction to hold the Court; and any question of regularity or irregularity in the proceedings cannot be reviewed or considered by this Court. If there is jurisdiction, then the Judge's action is not to be controlled by this Court, which, while it may perhaps prohibit his doing a wholly illegal or unauthorized act to the prejudice of the right of any individual, or may by mandamus direct and compel him to perform a duty imposed upon him that he wilfully neglects or refuses to do, cannot otherwise directly or indirectly interfere with the performance of his duties without usurping a jurisdiction that does not of right pertain to it.

I think there is no doubt an appeal or complaint made within thirty days after the clerk has posted the voters' lists is in time, and must be disposed of whether made after the making of an order appointing the time for the holding of the Court or not; and therefore that the appeals lodged after the 19th day of November, 1886, must be heard and disposed of. But it is not necessary on this application to express any opinion as to whether the Judge may deal with such appeals at the Court to be holden on the 30th November or not. To venture an opinion on that question on this application would, speaking for myself, be idle and of no force, and any such opinion would be clearly an *obiter dictum*. I am by no means certain that this Court has any right at all to interfere with election officers, except where express statutory power is given to it; and, were it necessary to determine whether the Court has such power on this application, I should require further time to consider the question. The Judge is a *quasi* officer of the Legislature with defined powers, and, I presume, may in some way be made responsible to the Legislature for any wilful neglect of, or improper conduct in, the discharge of the statutory duties imposed upon him.

In the present case he seems desirous of performing his duties in the public interests. As he apparently wishes to have the lists to be used in the coming elections in a condition to give to those who, as far as the assessment rolls indicate, are the persons entitled to exercise the franchise in the present year rather than to shut them out and subject those who now have the right to be displaced by those who may have ceased to have it by using the lists of the past year. If the franchise is an important right it ought to be enjoyed by those who really possess it, and not by those who have it not; and the Court should not interfere with the action of an officer which tends to promote the public interest, unless he is, in so doing, clearly exceeding his jurisdiction; and, for the reasons assigned, I do not think that the learned Deputy Judge of the county of Elgin has in the present case exceeded his jurisdiction.

The motion for prohibition must therefore be dismissed, with costs to be paid by the applicant.

ROSE, J.—I concur in refusing the writ of prohibition, on the ground that, in my opinion, under the Voters' List Act the Judge is not confined by the report of the clerk, but may, and should, hear all appeals.

GALT, J., concurred.

Motion refused.

[COMMON PLEAS DIVISION.]

REGINA V. MCFEE.

Criminal law—Forging endorsee's name to promissory note—No maker's name thereto at the time—32 & 33 Vic. ch. 19 (D.)

W., a Division Court bailiff, had an execution against the prisoner and H. M., and to settle same they arranged to give a note made by A. M. and endorsed by A. D. M. W. then drew up the note in question, which was payable to the order of A. D. M., and which he handed to the prisoner, who took it away to obtain, as he said, A. D. M.'s endorsement, returning shortly afterwards with the name A. D. M. endorsed thereon. He then handed the note to A. M., who signed his name as maker, and handed it to W., who took it away with him. The endorsement was a forgery. The prisoner was indicted for forging the endorsement on a promissory note, and convicted.

Held, following *Regina v. Butterwick*, 2 M. & Rob. 195; *Regina v. Mopsey*, 11 Cox 143, and *Regina v. Harper*, 7 Q. B. D. 78, that the conviction could not be sustained on the indictment as framed. The instrument, by reason of the maker's name not being signed to it at the time of the forgery, was not a promissory note; and neither could the conviction be sustained on the count for uttering, as after it was signed by A. M. it was never in the prisoner's possession, but was delivered by A. M. to witness.

Per CAMERON, C. J. As to the meaning of sec. 45 of 32 & 33 Vic. ch. 19 (O.), that possibly a conviction could be had under it, unless it only extended to perjury by making a copy of some existing document or thing written or printed or otherwise capable of being read, for the purpose of fraud, and not to the forgery of a name on a paper written properly as an original paper, and not as a copy.

THIS was a case reserved by Armour, J.

The prisoner Peter McFee was indicted for forging an endorsement on a promissory note; and in another count, for uttering the said note knowing that the endorsement thereon was forged.

It appeared from the evidence of Jacob Wilson, a Division Court bailiff, that he had an execution against Peter McFee, and Hugh McFee, and went to their farm to get the same settled when they offered to procure him a note to be made by Archibald McFee and endorsed by A. D. McFee. Wilson then drew up the note in question, payable to the order of A. D. McFee, which he handed to the prisoner. At this time there was no maker's name to the note. The prisoner took the note and went away for the purpose, as he said, of getting the endorsement of A. D.

McFee. He came back shortly afterwards with the name of A. D. McFee endorsed on the note. The note was then handed to Archibald McFee, who signed his name as maker, and then handed the note to the witness Wilson, who took it away with him and negotiated it. The endorsement of the name of A. D. McFee was a forgery.

The prisoner was convicted; but the learned Judge reserved judgment on an objection taken at the trial by Mr. Dickinson, counsel for the prisoner.

In Michaelmas Sittings, November 23, 1886, the case was argued.

McMuhon, Q. C., for the Crown referred to *Regina v. Harper*, 7 Q. B. D. 78; *Regina v. Mopsey*, 11 Cox. C. C. 143; *Archbold's Criminal Pleading and Evidence*, 20th ed., 660; *Harris's Criminal Law*, 3rd ed., p. 266; *Rex v. Pateman*, Russ. & Ry. 455; *Molloy v Delves*, 7 Bing 428; *Schultz v. Astley*, 2 Bing. N. C. 544; *Russel v. Langstaffe*, 2 Doug. 514; *LeBanque Nationale v. Sparks*, 27 C. P. 328.

Dickinson, contra.

December 24, 1886. GALT, J.—The question comes before us on the following facts :

“The prisoner's counsel objected on behalf of the prisoner that the indictment was not proved against the prisoner on the ground that the instrument being imperfect and incomplete at the time the alleged indorsement was made it was not a legal instrument and of no legal effect, and was not a promissory note, and that the act of writing the indorsement thereon, even if proved to have been done by the prisoner without the consent or authority of the said A. D. McFee, could not support the indictment.

“At the request of counsel for the prisoner I reserved the question whether upon the above facts” (the evidence bearing on the subject is set out in the case) “the prisoner could lawfully be convicted of the offence charged in the indictment, and I admitted the prisoner to bail to appear when called upon to receive sentence.”

From the evidence it appears that the prisoner took a paper purporting to be a promissory note which had been prepared by the witness to obtain the indorsation of one A. D. McFee, the said note being payable to the order of the said A. D. McFee. At the time when the witness handed the instrument to the prisoner there was no maker's name. After the prisoner returned he handed the note to one Archibald McFee who subsequently signed his name as maker and delivered the note to the witness. The indorsement was a forgery.

By 32-33 Vic. ch. 19 sec. 25 (D.), "Whosoever forges, or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any promissory note for the payment of money, or any indorsement on, or assignment of any such promissory note with intent to defraud, is guilty of felony."

I have set out the words of the statute respecting promissory notes, but by the same section precisely the same are applicable to bills of exchange.

Mr. McMahon stated he had been unable to find any cases relating to promissory notes, but he cited several as regards bills of exchange.

The first was *Regina v. Butterwick*, 2 M. & Rob. 196, in which it appeared that at the time when the prisoner caused a lad to write the name "John Chapman" across the bill as the acceptor thereof (which the lad innocently did), a blank was left on the bill for the drawer's name. The bill was produced at the trial, when there appeared upon it the names of Elstob and Butterwick as the drawers. Parke, B., held "that the indictment was not supported, as the instrument to which the forged acceptance was affixed was not, at the time of such supposed forgery, a bill of exchange there being no drawer's name."

He referred, also, to the case of *Regina v. Mopsey*, 11 Cox 143, in which it was held "that the document not having the signature of the drawer attached to it at the time the acceptor's name was forged was not a bill of exchange."

These cases were decided by the learned Judges presiding at the Assizes; but in 1881 the case of *Regina v. Harper* came before the Queen's Bench Division, 7 Q. B. D. 78, in which the facts were, that the prisoner, who was the acceptor of a bill of exchange, had forged the name of an indorser; at the time when the bill was sent to the prisoner the drawer's name was not signed.

Lord Coleridge, C. J.: "The conviction cannot be sustained. The instrument was not a bill of exchange; it was an inchoate bill of exchange;"

In the present case at the time the indorsement was forged the instrument was not a promissory note; it was an inchoate promissory note.

As respects the count for uttering, the same objection applies. When the prisoner handed the note to Archibald McFee it had no maker's name; and after it was signed by Archibald McFee it never was in the prisoner's possession, but was delivered by Archibald McFee to the witness.

CAMERON, C. J.—I am also of opinion, on the authorities cited on the argument and referred to in the judgment of my learned brother just pronounced, the conviction of the defendant cannot be sustained on the indictment as it has been framed. Technically the paper on which the defendant forged the endorsement of A. D. McFee was not a promissory note by reason of their being no promisor thereto at the time the defendant forged the endorsement. If, however, the matter were *res integra*, and not concluded by authority, I should hold the conviction should be sustained for the reason that when the defendant wrote the name of the intended endorser, he intended to forge the endorsement of a promissory note and put the paper he had endorsed in accordance with his fraudulent intention in process of becoming a promissory note by having the genuine signature of his father attached thereto as maker; and it would not stretch the law nor do violence to justice to hold the paper endorsed by him to be that which he intended it should be and caused it to become. This Court,

however, must submit to the decisions in the English Courts under the English Act, which in language is identical with that under which the defendant was indicted.

It is not very clear what section 45 of ch. 19 of 32 & 33 Vic. (D.) means or was intended to cover, but possibly a conviction might have been had under it unless that clause only extends to forging by making a copy of some existing document, or thing written, or printed, or otherwise made capable of being read for the purpose of fraud, and not to forging a name on a paper written properly as an original paper and not as a copy of any existing document or writing.

The order of the Justices of this Division of the High Court of Justice for whose consideration the question was reserved by Mr. Justice Armour upon the trial of the defendant, is that the defendant Peter McFee ought not to have been convicted on the said indictment, and that judgment thereon be arrested.

ROSE, J., concurred.

Conviction quashed.

[COMMON PLEAS DIVISION.]

COWAN V. LANDELL.

Slander—Privilege—Malice—Father and son—Counsel and attorney.

The defendant's son, alleged to be an infant within twenty-one years of age, was brought before a magistrate charged with assault. The defendant attended before the magistrate. On the plaintiff being called as a witness on the prosecutor's behalf, the defendant objected to his giving evidence, stating that "he," plaintiff, "is a perjurer, he perjured himself three times at Butts's trial before you." There was no evidence to shew that the defendant was acting by and on behalf of his son, with his son's consent, nor was it absolutely proved that the son was a minor.

Held, that the communication was not privileged, and could not be withdrawn from the jury. A nonsuit entered by the learned Judge at the trial was therefore set aside and a new trial directed, with costs to the plaintiff, if he succeeded, but, if not, without costs, unless the parties agreed to the action being dismissed, with costs to be paid by the defendant.

Per CAMERON, C. J.—Under like circumstances a counsel, attorney, or party to the action or proceeding would be privileged; and *Seemle* also, even a stranger when permitted by another to act for him with the magistrate's sanction.

Per CAMERON, C. J., also. If the defendant was acting in good faith and without malice, under the belief that it was his duty to inform the magistrate of the witness's bad character, he might have a qualified privilege, but the question of malice would be for the jury.

THIS was an action brought on for trial before Galt, J., and a jury, at Ottawa, at the Fall Assizes of 1886.

It was an action of slander against the defendant for stating on the occasion of the trial of the defendant's son before a magistrate that "the plaintiff perjured himself three times: that he perjured himself before you: that he perjured himself before you at Butts's trial."

The defendant denied the allegations in the plaintiff's statement of claim, and alleged that the defendant's son Andrew, an infant within the age of twenty-one years, was brought before one James Johnston, a Justice of the Peace, having jurisdiction in the matter, charged with assault on one Lagueworth, and that the defendant attended said trial in the interest of and acted thereon as agent for his said son, and when the plaintiff was called to give evidence on said trial against the said Andrew

Landell, the defendant, acting as such agent for his said son, took exception to the plaintiff giving evidence; and in taking such exception the defendant stated to the said Justice, "I object to this man's evidence on the ground that he is a perjured man; he perjured himself on a former occasion in your presence on Butts's trial." The statement was made *bond fide* by the defendant, and without malice, in the course of the proceedings at the said trial and not otherwise; and was so made by the defendant acting at the said trial in the interest of and as agent for the defendant's said son; and was privileged.

At the trial of this action the plaintiff gave evidence to the following effect: that on the 5th July last he was a witness before Mr. Johnston, the magistrate, as a witness between Mr. Landell's son and Mr. Lagueworth: that he was sworn by the magistrate and got up to give evidence. Then the defendant got up and said, "I object to this man's evidence; he is a perjurer; he perjured himself three times at Butts's trial before you." Mr. Johnston told him to look out what he was saying; that he should be very careful not to take any man's character. The defendant made no remark when Johnston spoke.

In cross-examination, the plaintiff said Landell was there on behalf of his son, and raised the objection that he should not be sworn. He supposed he was acting on behalf of his son, but did not know.

The magistrate was called as a witness for the plaintiff, and said that he was sitting as a magistrate on the case between Landell's son and Lagueworth, and called on the plaintiff to give evidence. The defendant sprang up, and said, "I object to this man. He perjured himself before you at Butts's trial." Witness checked him, and told him it was dangerous to make that charge, or something to that effect.

In cross-examination he said that the defendant's son was a young man. He was not able to say whether he was fifteen or sixteen. He might be that. Witness was sitting in open court. The defendant's son was there. There

was no one acting for him. His father didn't come in question at all. There was no person took part in the defence but him. He just stood there before witness. Nobody took part in his defence. His father was in company with him that day. The father had nothing to do with the defence; didn't ask any questions. He only just objected to this man's evidence. Not sure he wanted to ask any questions. He did not in any way make himself conspicuous until Mr. Cowan was sworn.

At the close of the case the learned Judge dismissed the action, on the ground that the occasion was privileged.

In Michaelmas sittings, *Allan Cassels* moved on behalf of the plaintiff, pursuant to notice of motion, to set this judgment aside and for a new trial, on the ground that the nonsuit was contrary to law and evidence and the weight of evidence.

During the same sittings, December 2, 1886, *Allan Cassels* supported the motion. The question is, whether the occasion was privileged. The defendant was not present in any capacity on behalf of his son. The magistrate's evidence clearly shews this, as he says he in no way acted for the son. There was, therefore, no privilege, and the case should have gone to the jury. The privilege may be either absolute or qualified. Where the privilege is absolute, then the case is properly withdrawn from the jury, but where there is only a qualified privilege then malice may be shewn, and this is a question for the jury. A father acting for his son would only be entitled at the most to a qualified privilege. The father occupies a different position altogether from a counsel. Under the Act of 1869, 32 and 33 Vic. ch. 31, sec. 30, (D.), only a counsel or attorney is allowed to appear for a person charged before the magistrate. The leaning of the Courts is against extending the privilege. He referred to *Odger* on Libel and Slander, 185, 187, 196; *Flood* on Libel and Slander, 151, 161; *Seaman v. Netherclift*, 2 C. P. D. 53, 56; *Wilcocks*

v. *Howell*, 5 O. R. 360; *Blugden v. Bennett*, 9 O. R. 593; *Roberts v. Climie*, 46 U. C. R. 264; *Cooke v. Wiles*, 5 E. & B. 328, 341.

Mosgrove, contra. The father was acting for his son. He was there as agent for his son who was a minor. It is quite clear that a counsel in such a case would be privileged. This was the proper time to raise the objection to the witness. He referred to *Bevis v. Smith*, 18 C. B. 126; *Schouler on Domestic Relations*, 315; *Harrison v. Bush*, 5 E. & B. 344, 25 L. J. N. S. Q. B. 25; *Davis v. Snead*, L. R. 5 Q. B. 608; *Spill v. Maule*, L. R. 4 Ex. 232; *Scarll v. Dixon*, 4 F. & F. 250; *Kershaw v. Bailey*, 1 Ex. 743.

A. Cassels, in reply, referred to *Starkie on Slander*, 3rd ed., 314; *Hodgson v. Scarlett*, 1 B. & Al. 232, 245; *Clark v. Molyneux*, 3 Q. B. D. 223.

December 24, 1886. CAMERON, C. J.—The question presented by this case, if the fact were admitted that the defendant acted for his son and was not a mere volunteer or intruder in the matter, is rather a nice one, and, as far as I am aware, there is no authority that can be said to cover the point. The law is reasonably clear that in like circumstances a counsel, attorney, or a party to the action or proceedings, would be privileged; and I am inclined to think that even a stranger permitted by another to act for him with the sanction of the magistrate, though such stranger was neither a solicitor nor counsel, would be within the privilege if he acted *bonâ fide*. In the present case the character of the plaintiff for veracity was a matter pertinent to the enquiry. He was a witness to give evidence on the charge preferred against the defendant's son, and therefore the defendant's impeachment of his veracity would not be actionable if he had a right to interfere at all.

In *Seaman v. Netherclift*, 2 C. P. D. 53, where the absolute privilege of a witness was determined, a statement volunteered by the witness, defamatory in its character, was privileged as affecting his own credit as a witness.

The defendant was asked on cross-examination whether he had given evidence in the case of *Davies v. May*, and whether he had read the Judge's remarks on his evidence. He answered, "Yes." Counsel asked no further questions, and defendant insisted on adding, though told by the magistrate not to make any further statement as to *Davies v. May*, "I believe that will to be a rank forgery, and shall believe so to the day of my death." The action was brought for these words by one of the attesting witnesses to the will referred to. The jury found that the words were not spoken by the defendant as a witness in the course of the enquiry, but maliciously for his own purpose with intent to injure the plaintiff. The Court directed a nonsuit, notwithstanding the findings of the jury.

In giving judgment Cockburn, C. J., at p. 57, said: "What the defendant said was said in his character of a witness; for there can be no doubt that the words were spoken in consequence of the question put to him by counsel for the prosecution, the object and effect of the cross-examination having been to damage his credibility as a witness before the magistrate, and of this the witness was conscious. The counsel, having put the question, stops; and if there had been counsel present for the prisoner who had re-examined the witness, he would have put the proper questions to rehabilitate him to the degree of credit to which he was entitled. That such questions would have been relevant I cannot bring myself for a moment to doubt, relating as they do to the credibility of the witness, which is part of the matter of which the magistrate has to take cognizance."

It will be noted that the plaintiff in that action was no party whatever to the proceeding before the magistrate, and therefore he was in a sense needlessly brought in by the witness declaring the will to have been a forgery.

In charges coming within the summary jurisdiction of magistrates a defendant has a right to appear and make defence by counsel or attorney under section 30 of 32 & 33 Vic. ch. 31, (D.) It may be that the word attorney as here

used means an attorney-at-law or solicitor, but I am not prepared to say that that is so.

By section 31 the complainant or informant may conduct the complaint or information, and may also have the witnesses examined by counsel or attorney.

The difficulty that stands in the defendant's way of upholding the judgment in his favour is that his status before the magistrate, which seems to me on the evidence was a question of fact, was not made to appear. It was not absolutely proved that the defendant's son was a minor. The magistrate said he might be fifteen or seventeen, but he could not say. A minor in a criminal case is not under any disability on account of his infancy. He is bound to plead to the charge, and, though incapable of appointing an attorney to defend him in a civil case, he would have that power in a criminal case under the clause I have above referred to.

If then the defendant was authorized by his son to act for him, I am of the opinion he would have the same privilege that the defendant would have, and the privilege would cover the defamatory words used by him in respect to the plaintiff on the occasion when they were uttered. I think however, in the absence of proof that he was acting for and on behalf of his son with his son's consent, or that his son was in fact a minor, it cannot be assumed as matter of law that his being the father of the accused made his interference lawful and entitled him to the protection of the privilege that would exempt his son himself, his counsel or attorney, from liability. It will be observed, too, that the defendant in his pleading claims the right to prove the allegations in the statement of defence. I do not think a mere looker on in Court is at liberty to make defamatory remarks of either of the parties concerned in the litigation or enquiry. There was no obligation cast by the law on the defendant to interfere on his son's behalf. He could not have been forced by his son to act for him, and no duty he owed to the public required him to do so. The plaintiff had not been convicted of perjury, and the only

way of impeaching his testimony would be by the testimony of witnesses prepared to swear from his general bad character for truth or veracity they would not believe him on oath, or by shewing by himself on cross-examination his want of credibility. But still I think the defendant, acting in good faith and without malice under the belief that it was his duty to inform the magistrate of the bad character of the witness, might have a qualified privilege; and it would be for the jury to say on the whole case, having regard to the time, place, and manner in which he spoke the defamatory words, whether he acted maliciously or not.

I think the judgment dismissing the plaintiff's action with costs, should be set aside, and a new trial had, unless the parties are willing that the action should be dismissed with costs to be paid by the defendant, which, having regard to the circumstances of the case and the probability the defendant was acting for his son with his son's consent, I think, will probably be the best for all the parties concerned; and the defendant cannot complain of having to pay costs as he took the non-suit on the understanding that he might have to pay costs if the non-suit could not be supported.

If the parties do not agree to this the nonsuit must be set aside, with costs to the plaintiff if he succeeds; and, if not, without costs of the former trial and motion to either party.

ROSE, J.—I agree with the learned Chief Justice that on the evidence in this case the defendant had no right to interfere.

It is not necessary, therefore, to determine whether, if he had appeared as agent for his son, he might have been protected in the use of such language.

Even if the counsel had been engaged for the son, and had, after the witness was sworn, protested against the evidence being received, on the ground that the witness

had perjured himself in another case, I would not be sorry to find that he was not privileged.

It certainly seems a very great license to take to boldly accuse a witness of perjury under circumstances which prevent any complete answer being made or investigation of the charge had.

It seems to me not in the interest of society that men should be allowed, because in Court, to make cruel and unnecessary statements as to the character of those to whom they may be opposed.

The decisions have gone far enough in that direction, and until better advised I am not prepared to carry them a step farther.

GALT, J., took no part in the judgment.

Judgment accordingly.

[CHANCERY DIVISION.]

BEATY V. SHAW ET AL.

Mortgage by executor to co-executor—Death of mortgagee—Discharge by mortgagor as surviving executor—Validity of discharge—Improvements under mistake of title.

The Rev. W. H. died leaving F. H. and W. H. his executors, who both proved the will. F. H. on January 17, 1874, mortgaged certain lands to W. H. his co-executor, to secure certain moneys due by F. H. to the estate of Rev. W. H., both mortgagor and mortgagee being described as executors of that estate. Interest was paid on that mortgage up to April 1, 1885. The executor W. H. died intestate in July, 1879. On April 10, 1884, F. H. sold the lands to M. and on same day executed a discharge of his own mortgage which was registered April 15, 1884, in which the mortgage was misdescribed as if it had been taken to the Rev. W. H.

In an action by the plaintiff who had been appointed by an order of Court to represent the estate of Rev. W. H. on the mortgage, against several defendants who had become owners of the land, in which the defendants contended that the discharge of F. H. was valid and claimed for their improvements under mistake of title. It was

Held, that the mortgage was not discharged, nor the estate reconveyed to F. H. by what was done, and that the legal effect of the mortgage was to enable W. H. to hold the estate in his own right as against F. H., although as regards the beneficiaries under the Rev. W. H.'s will W. H. was only a trustee. R. S. O. ch. 111, sec. 67, contemplates the action of two parties one to pay and the other to receive, and not both represented by one, and that one whose duty and interest were in direct conflict, and under these circumstances such a transaction could not stand.

The defendants had actual notice by the registered discharge, that F. H. as surviving executor of the Rev. W. H., was attempting to deal with himself as mortgagee, and it was at their peril they took such a title without satisfying themselves there was a satisfaction and discharge of the mortgage moneys as regards the persons entitled under Rev. W. H.'s will. But a reference was ordered as to improvements under mistake of title.

Bacon v. Shier, 16 Gr. 485, considered and distinguished.

THIS was an action brought by James Beaty, who had been appointed by order of the Court under 13 and 14 Vic. c. 60, and R. S. O. c. 40, to represent the estate of the Rev. Professor William Hincks, deceased, whose executors were dead, in respect to a certain mortgage which belonged to said estate, against James Shaw, John Moran, and several others who had become owners of the lands or portions thereof covered by the said mortgage after the said mortgage was made and registered.

The plaintiff's statement of claim alleged that the mortgage dated February 17, 1874, was made by Sir Francis Hincks to William Hincks, as trustee and executor, under the will of the Rev. Professor William Hincks, deceased: that William Hincks died intestate subsequent to the making of the mortgage: that the plaintiff had been appointed to represent the estate of the Rev. Professor William Hincks: that the defendants had become the owners of the lands, and that the mortgage was in arrear and claimed the amount due.

The defendants, by their statements of defence, alleged that Sir Francis Hincks was a co-trustee and co-executor, with William Hincks, under the will of the Rev. William Hincks, and as such was entitled after the decease of William Hincks, who predeceased him to the moneys secured by said mortgage and to discharge the same: that the said Sir Francis Hincks sold the lands covered by said mortgage to the defendant John Moran, and discharged said mortgage as the sole executor of the Rev. William Hincks: and each defendant as to the respective portions of the lands owned by them, claimed compensation for for improvements under mistake of title.

The action was tried at the sittings at Toronto, on November 4, 1886, before Boyd, C.

At the trial the mortgage was produced, and it was proved that it had never been out of the custody of the solicitor for William Hincks, and that said solicitor had no knowledge whatever of the alleged discharge until after the death of Sir Francis Hincks, which happened in August, of 1885, as the interest was paid by the mortgagor up to April 1, 1885.

J. C. Hamilton and *Allan Cassels*, for the plaintiff. The certificate of discharge* mentions a mortgage to Rev. Professor Hincks, but the mortgage was made to William Hincks. Sir Francis Hincks was not acting as executor of his brother, the Rev. Professor Hincks. He gave the

* Set out in judgment.

mortgage as mortgagor and as *debtor* to that estate. It lay on the purchaser at all events to see that the money which he paid was properly applied. The mortgage was lying in the hands of the solicitor of William Hincks all the time. As to the improvements the statute does not apply to a mortgagee. R. S. O. c. 111, s. 67, speaks of the person entitled by law to receive and to discharge the mortgage. The mortgage debt was never paid, and Moran and those claiming under him bought, subject to the registered mortgage, with full notice and at their own risk. The mortgage is really a mortgage from Sir Francis Hincks to William Hincks, as the words as to executorship, &c., are surplusage, and merely words of description. See also R. S. O. c. 107, s. 7.

Bain, Q. C., contra. The discharge of mortgage is valid : *Bacon v. Shier*, 16 Gr. 485. Even if it is not valid, the payment of \$3,000 made is a payment on the mortgage to that extent. The effect of the deed by Sir Francis Hincks, if he was entitled to the mortgage by survivorship, was to pass the whole estate, whether the discharge was valid or not. He held the legal estate as trustee, and equity of redemption as owner : that gave him all, and he sold and got paid the full value of the lands. As to survivorship, see *Lewin on Trusts*, 6th ed., 230, 'There is a sufficient discharge on the registry. As to the three acres owned by Kelly, they were not owned by Sir Francis at the time he made the mortgage ; although he included them, they did not become his property until subsequently. The Court order appointing plaintiff, shews he claims under Sir Francis as " survivor."

Hamilton, in reply. If Sir Francis had power as survivor, he would have the like power as one executor during the life of the other. The mortgage cannot be broken up in parts as to Kelly's three acres. The priority given by registration cannot be displaced, as it would practically be by declaring the value of the improvements a first charge on the lands. If the defendants have any right to relief as to improvements, it can only be to redeem

the plaintiff on paying the value of the lands without the improvements, which value can be readily ascertained, and the priority of the plaintiff, and provisions of the Registry Act will thus not be affected. See also *McLennan v. McLean*, 27 Gr. 54.

November 24, 1886. *BOYD, C.*—There is no case in the books governing this. *Bacon v. Shier*, 16 Gr. 485, is widely distinguishable. That case grew out of transactions first reported in *McPhadden v. Bacon*, 13 Gr. 591. John Shier had executed a mortgage to one Pangman, who afterwards died, leaving a will and naming as his executors the said Shier and one Bacon. Bacon did not interfere in the management of the estate, but allowed his co-executor Shier to take the active part of the duties. Shier, the executor, being in possession of his own mortgage, then arranged for an exchange of the land mortgaged for other less valuable land, and received as owelty of exchange some \$1,400. He then signed a statutory certificate of satisfaction of the mortgage moneys, which was registered as a discharge of his mortgage. The payment was allowed as a valid reduction *pro tanto* of the sum secured by the mortgage, and was treated as a proper payment, for two reasons (1) Because the mortgagee by appointing the mortgagor executor had empowered him to receive all moneys due to the estate, and the party paying had the right to believe that the money would be faithfully applied to the purposes of the estate, and (2) Because Bacon being asked before the payment if he was satisfied that the money should go to his co-executor, assented to this being done, saying that Shier was the acting executor.

In the present case, Sir Francis Hincks and William Hincks were executors of the Rev. Professor Hincks, and the mortgage in question was made to secure a loan of about \$5,000 made out of the assets of the testator by the one executor William to the other, Sir Francis. By the directions of the will, the property of the testator was to be converted as soon as possible, and to be in-

vested so as to produce a regular income, which was to be paid to his two daughters equally during their lives, and the whole to the survivor for her life. Then after the decease of both the *corpus* was to be divided equally between the testator's four grand daughters. The testator died in September, 1871, and this mortgage was made by Sir Francis on the 17th January, 1874. It purports to be "between Sir Francis Hincks, K. C. M. G., C. B., of the city of Montreal, in the Province of Quebec, (hereinafter called the mortgagor), one of the executors of the late Rev. William Hincks of the first part; and William Hincks of the city of Washington, in the district of Columbia, U. S., Esquire, (hereinafter called the mortgagee) one of the executors of the said late Rev. William Hincks of the other part," and is in other respects in the statutory form. It was duly registered, and the principal sum was payable on the 1st of February, 1877, with interest quarterly at eight per cent. Interest was paid on this mortgage by the mortgagor down to 1st April, 1885, but no principal. In July, 1879, the executor and mortgagee, William Hincks, died intestate, leaving him surviving two sisters who were the daughters of the Rev. Professor Hincks, and the life tenants under his will. In August, 1885, Sir Francis Hincks died, having first, however, assumed to dispose of the mortgaged land, divested of the mortgage, to the defendants, who claim now to hold it as registered purchasers for value against the plaintiff who has been appointed to represent the estate of the Rev. Professor Hincks and the parties beneficially interested under his will.

The question is, Can the defendants hold free from the mortgage?

They claim to do so under a certificate of discharge, signed on the 10th April, 1884, by Sir Francis Hincks as "sole surviving executor of the late Rev. William Hincks."

It was registered on the 15th April, 1884, and reads as follows:

DOMINION OF CANADA.

PROVINCE OF ONTARIO.

To Wit:

To the Registrar of the county of Renfrew :

I, Sir Francis Hincks, of the city of Montreal, in the Province of Quebec, sole surviving executor of the late Reverend William Hincks (deceased), do certify, that he has satisfied all money due on or to grow due on a certain mortgage made by Sir Francis Hincks, of Montreal, in the Province of Quebec, to the late Reverend William Hincks, deceased, which mortgage bears date the twentieth day of February, A.D. 1874, and was registered in the Registry Office for the county of Renfrew, on the twenty-fourth day of February, A.D. 1874, at — minutes past ten o'clock, forenoon, in Liber C. for the township of Horton, as No. 791.

That such mortgage has not been assigned, and that I am the person entitled by law to receive the money, and that such mortgage is therefore discharged.

Witness my hand this tenth day of April, A.D. 1884.

Witness:

(Signed) F. HINCKS,

(Signed) JAS. WALKER.

Executor of the late Rev. Wm. Hincks,
deceased.

It is to be noted that this certificate misdescribes the mortgage as if it had been taken by the testator, Rev. Prof. Hincks.

On the 10th April, 1884, Sir Francis Hincks executed a deed of the land to the defendant Moran, which was registered on the 15th for \$3,500: of this \$1,500 was paid down, and the rest, secured by mortgage, was soon after also paid. Moran afterwards sold to Shaw and was paid the price \$2,200.

In my opinion the mortgage has not been discharged nor the estate reconveyed to Sir Francis Hincks by what has been done. It is only by introducing the doctrine of survivorship as between joint executors or trustees that even a plausible argument can be advanced to support the title of the defendants. But though these two were in one sense joint executors and trustees as to the assets generally of their testator, that was not their character with respect to this mortgage transaction. There, one was mortgagor and the other was mortgagee, and the mortgage does not on its face shew any right of survivorship. It is drawn up as such an instrument might be between

strangers, for the words appended "one of the executors" are descriptive and merely surplusage so far as affecting the devolution of the title and the money upon the death of William Hincks, the mortgagee. The legal operation of this mortgage was to enable William Hincks to hold the estate in his own right as against Sir Francis Hincks, though as regards the beneficiaries William Hincks was only a trustee. This was the character of the transaction throughout, because the mortgage was always held by Mr. Beaty as solicitor for William Hincks, as mortgagee, and after his death as agent for the beneficiaries. It was argued that after the death of William the rightful custody of the mortgage was with Sir Francis as surviving executor of the Rev. Prof. Hincks, but this is clearly not the law: *Riorden v. Brown*, 1 C. P. 199, 203, and no such claim was even made by him during his life.

If then the defendants depart from the strict legal effect of the mortgage and seek to introduce by extraneous evidence the fact that the security really represents assets of the estate of Rev. Prof. Hincks, so as to give Sir Francis the benefit of being entitled to discharge it as surviving executor, they are met by equities and other difficulties which appear to me insuperable.

The Registry Act R. S. O. ch. 111, sec. 67, contemplates the action of two parties: one to pay and the other to receive the mortgage money due the mortgagor or his representative, the other the mortgagee or his representative. Here these two are but one, and that one, as said by Van-Koughnet, C., in 13 Gr, 595, "whose duty and interest are in direct conflict." The Act never contemplated such an anomalous condition of affairs that one individual should consummate a bi-lateral engagement in which he was to deal at arm's length with himself. But if such a thing were possible, the substance of the transaction in this case is that a debtor to the estate settles with himself as executor of the estate. In these cases the Court does not weigh the matter to determine what should be done, but says at once that such a transaction cannot stand; that is the

language of Lord Eldon in *Cook v. Collingridge*, Jac. R. 621, which was lately adopted by the Privy Council in *De Cordova v. De Cordova*, 4 App. Cas. 702.

The Registry Act does not protect the defendants. They had actual notice by the registered discharge, that Sir Francis Hincks, the surviving executor of the Rev. Prof. Hincks, was attempting to deal with himself as mortgagee, and it was at their peril if they chose to accept such a title without satisfying themselves that there was a real satisfaction and discharge of the mortgage moneys as regards the persons really entitled under the will of the Rev. Prof. Hincks. In this case the registration of the certificate did not exempt the purchaser from seeing to the due application of their moneys. To the extent to which these were properly applied under the will of the testator they are entitled to protection. But it is not suggested that any benefit would result from such an inquiry, and there appears to be no doubt that none of the moneys reached the hands of these beneficiaries.

I expressed my view during the argument that there is a sufficient case of improvement under mistake of title on the part of the defendants who have filed defences to justify a reference on this head.

I see no ground to except the three acres from the operation of this judgment. Whenever the title to these was acquired by the mortgagor it would enure to the benefit of the mortgagee, under the holding in *Edinburgh Life Assurance Co. v. Allen*, 23 Gr. 230. And there is no evidence that the mortgagor was not the person entitled to the land, though having no formal conveyance, when he made the mortgage which, by its terms, covered these three acres.

The general costs of action should go to the plaintiff. As to the improvements the defendants should set a value on them, which if not accepted by the plaintiff, there will be a reference to determine what should be paid, in which case the costs of the inquiry will follow the result.

[CHANCERY DIVISION.]

MUTTLEBURY V. STEVENS.

Mortgage—Foreclosure—Rate of interest for time given for redemption.

In proceedings to foreclose a mortgage on which the principal money had become due by default being made in the payment of interest, although the time for which the mortgage was made had not arrived.
Held, that the rate of interest for the six months allowed to redeem should be computed at the same rate as the mortgage provided for, which in this case seemed a reasonable rate.

THIS was an action of foreclosure brought on a mortgage made in pursuance of the Act respecting Short Forms of Mortgages, on which some instalments of interest and principal were in arrear, although most of the principal money was not due except by reason of the provision that the principal money should become due and payable whenever default was made in the payment of the interest. The rate of interest provided for by the mortgage was seven per cent., but on the settlement of the amount due the Registrar, following the late decision of *Powell v. Peck*, 6 C. L. T. 530, 12 O. R. 492, calculated interest only at the rate of six per cent. for the six months allowed to the defendant, within which he had the right to redeem.

From this ruling the plaintiff appealed to the Court, and the question was argued on November 24th, 1886, before Boyd, C.

F. E. Hodgins for the plaintiff. The time is not yet expired for which the defendant contracted to pay seven per cent. interest, although the principal money has become due by reason of his default in the payment of the interest. By R. S. O. ch. 104, sec. 16 of Schedule B, the defendant is relieved from the consequences of the non-payment of so much of the mortgage money as is not due by lapse of time upon payment within such time as the practice of equity provides; so that if he is only charged six per cent., instead of the seven per cent. he contracted to pay, for the

six months allowed him by the Court, he could take advantage of his own default. [BOYD, C.—It is a matter in the discretion of the Court that if the Court gives the mortgagor an indulgence in the shape of six months' time, within which he may redeem, that it should be on the condition that he pay the rate of interest he stipulated to pay.] Yes, the same as if he was bringing an action for redemption, when he should pay the stipulated rate. *Re Roberts, Goodchap v. Roberts*, 14 Ch. D. 49, does not decide a case of an action for redemption, but a case of an action on a covenant. I refer to *Elton v. Curteis*, 19 Ch. D. 49; *Popple v. Sylvester*, 22 Ch. D. 98. The security of the mortgage as a security is not merged in the judgment: *Ex p. Fewings*, 25 Ch. D. 338.

November 30, 1886. BOYD, C.—The mortgage stipulates that interest shall be at the rate of 7 per cent. half yearly, “upon such balance of the said mortgage as may remain unpaid at the time when the interest becomes payable respectively.” The last of the payments of principal to fall due on 15th October, 1893.

The plaintiff seeks to foreclose on account of failure to pay some of the first instalments of interest, and has a judgment giving the defendant six months to redeem on payment of the whole sum.

The clause accelerating payment of the whole in default of payment of interest is by the statute, p. 999, R. S. O. ch. 104, thus to be extended: *i. e.*, that the principal shall become due and payable to all intents and purposes whatsoever, and with like consequences and effects as if the time mentioned for payment of principal money had fully come and expired; but that in such case the mortgagor, within such time as by the practice of equity, relief could be obtained on payment of all arrears with lawful costs and charges be relieved from the consequences of the non-payment of so much of the money as may not then have become payable by reason of lapse of time.

The Registrar has computed interest at 6 per cent. instead of 7 per cent. for the period allowed for redemption, and the plaintiff applies to rectify this. The officer of the Court followed what was laid down in *Powell v. Peck*, 6 C. L. T. 531, 12 O. R. 492, in a mortgage case where the account was continued after the maturity of the mortgage.

The effect of the cases is to shew that the contract to pay interest at 7 per cent. only extends up to the day fixed for payment in the mortgage upon such words as are used here, though interest as damages may be recovered after that period, for the rate mentioned in the mortgage up to time of final judgment: *Re European C. R. W. Co.*, 4 Ch. D. 37, 38; *St. John v. Rykert*, 10 S. C. R. 278; *Ex parte Furber*, 17 Ch. D. 191. These are cases, however, in which the right to recover depended upon the practice of the Court, where the action is upon the covenant, or upon the security viewed in its legal aspect.

There is here no express covenant to pay interest during the continuance of the security, "so long as the security should continue," as in *King v. Greenhill*, 6 M. & Gr. 59, or "so long as the principal sum should remain due on the security of the mortgage," as in *Popple v. Sylvester*, 22 Ch. D. 100. This was dealt with as an express covenant to pay interest as long as anything could be recovered out of the security: *Ex p. Fewings*, 25 Ch. D. 349. I am not now concerned with the larger question involved in *Powell v. Peck*, *supra*, but only as to the rate of interest during the period (usually six months) allowed by the practice of the Court for redemption, which is adverted to in the statute. I may refer to the language used by a very learned and accomplished Equity Judge, Amphlett, J. A., in *Gordillo v. Weguelin*, 5 Ch. D., at p. 303: "Having regard to what is the principle in Equity with regard to the redemption of mortgages, although the day for payment has passed, and there is no provision with the creditor for payment of interest after that day, the Court will assume that interest is payable after the day at the same rate as before. * * What has to be paid may

technically be called damages, but they are damages of a peculiar kind, for it would not be left to a jury to regulate their amount; the jury would be directed as a matter of law to find damages of the same amount as the interest, which would have been payable if the covenant had extended over the period."

Lord Justice Brett, in the same case, at p. 301, thus speaks: "The words 'in redemption of' do not merely mean payment, but mean redemption in its equitable sense, and the debtors taking up these bonds must redeem them on the ordinary terms, that is to say, they must pay the principal, not with interest as interest, but with the damages which a jury would give instead of interest. In a Court of Equity it is not called damages, but it is called interest, or more properly speaking, perhaps, redemption money." He again refers to it, p. 302, as interest, "not in its strict sense but in its equitable sense, as compensation for the delay in paying beyond the day fixed for payment." To the like effect is L. J. James, reported at p. 297: "I am quite satisfied that it would be impossible, according to any principle upon which this Court acts in cases of redemption, to say that bonds could be taken out of the hands of the holder until he had been paid principal and interest, and that which is called damages or interest by way of damages (it does not signify which) up to the day of payment."

This distinction as to redemption is also recognized by Cotton, L. J., in *Re Roberts, Goodchap v. Roberts*, 14 Ch. D. 52, as compared with what is recoverable in an action of covenant upon a mortgage deed. See, also, what is said by him in *Ex p. Fewings*, 25 Ch. D. 348, 352. The view expressed by Jessel, M. R., in *Re Roberts* does not quite accord with the opinion expressed by Amplett, J. A., in the case above referred to, which was not cited in 14 Ch. D. In reply to what was argued that the proper measure of damage for non-payment on the day was the rate of interest fixed by the parties themselves before the day, he observed: "I think that would be so if the rate of

interest named by the parties was below £5 per cent., but I know of no authority which says that more than £5 per cent. will be given by way of damages." And further on at p. 52 he says: "In an action at law for the non payment of money on a day certain, where it is an interest-bearing debt the rule has always been to recommend the jury to give 5 per cent., because that is the usual commercial value of money. If there ever should come a time when it fell very much, juries might give less, or if it rose very much they might give more, but that is the reason of the rule. The fact of the parties having bargained for a higher or a lower rate of interest for a time certain is always to be taken in consideration as shewing the value of money, but it does not decide the question." These views expressed by the M.R. were in conflict with the case of *Morgan v. Jones*, 8 Exch. 620, which is precisely an authority on the point as to which he said he was not aware of any authority. See also *Keene v. Keene*, 3 C. B. N. S. 144.

It was said in *Simonton v. Graham*, 8 P. R. 496, by Blake, V. C., that when no rate of interest was fixed to be paid after maturity of the mortgage, *primâ facie* the rate stipulated for up to that time should be taken as a measure of the damage for the delay in paying, but that ought not to be conclusive, as it might be reduced by shewing that it was more than the ordinary value of the money. This case was acted on by Rose, J., in *McDonald v. Elliott*, 12 O. R. 101. These cases are based upon the convenient working rule laid down by Lord Cairns, in *Cook v. Fowler*, L. R. 7 H. L. 33, that when provision is not made for the payment of subsequent interest "*primâ facie*, the rate of interest stipulated for up to the time certain might be taken and generally would be taken as the measure of interest, but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages." To the like effect is Lord Selborne reported at p. 37, "The rate of interest to which the parties have agreed during the term of their contract may well be adopted

in an ordinary case of this kind by a Court or jury, as a proper measure of damages for the subsequent delay; but that is because ordinarily a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, had been agreed to."

I think that for the period allowed for redemption and as part of the price of redemption interest should be computed in this case at seven per cent. It is an incident of the mortgage that there should be this period allowed for redemption in ease of the mortgagor, and the parties may reasonably be taken as contemplating this when they fix the rate of interest. Besides, here the time for payment is accelerated by the contract of the parties. The mortgage provided that the rate of seven per cent. should go on till 1893. There is nothing unfair or unreasonable, therefore, in fixing the rate for the period allowed for redemption in 1887, and besides the rate itself is not such as to induce the Court to modify the ordinary terms of redemption as expounded by Amphlett, J. A.

The judgment will therefore be amended by computing at the rate of seven per cent. for the six months allowed for redemption.

G. A. B.

[CHANCERY DIVISION.]

MEYER ET AL. V. BELL.

Seduction—Right of mother and step-father to maintain action when daughter not living with plaintiffs.

In an action for seduction brought by the mother and step-father of the daughter, it appeared that at the time of the seduction the daughter was not living at home with the plaintiffs, but was out at service :

Held, (affirming the judgment of GALT, J.) that the plaintiffs had the right to maintain the action.

Quære, as to the mother's right to sue alone.

THIS was an action brought by Catherine Meyer and John Meyer, her husband, the mother and step-father of Catherine Bachinger, against James Bell, for the seduction of the said Catherine Bachinger.

This action was tried at the Autumn Assizes for 1886, at Welland, before Galt, J., and a jury.

W. M. German, for the plaintiff.

B. B. Osler, Q.C., for the defendant,

The evidence shewed that at the time of the seduction Catherine Bachinger was not living at home with the plaintiffs, but was employed as sewing girl and nurse at the hotel of one Deterling, and that the seduction had taken place on the fourth interview between the defendant and the seduced, the other three interviews having all taken place when other people were present. At the close of the plaintiffs' case:

Osler, Q.C., objected that no case had been made out. The action was brought on behalf of the stepfather and the mother jointly, while only one action was possible, and only one plaintiff was possible. The male plaintiff is not within the statute which gives the action to the father and mother, and he has not shewn loss of service, the girl having been seduced while in the employ of another.

The objection was overruled.

The jury brought in a verdict for \$1,500.

Against this verdict, the defendant appealed to the Divisional Court, and moved for a new trial, and the motion was argued on December 2nd, 1886, before Boyd, C., and Proudfoot, J.

Oslar, Q.C., for the motion. The verdict is moved against on two grounds (1) The right of the plaintiffs to recover, and (2) The amount of the damages. By section 1 of R. S. O. ch. 57 the father or in case of his death the mother has the right of action, and by section 3 any person other than the father or mother, who would be entitled at common law can bring it after six months, but neither of these sections meet this case where the mother has married again. This is not a case where the mother could maintain the action if the daughter was living at home, as the right to maintain it would be in the step-father: *McIntosh v. Tyhurst*, 24 U. C. R. 433. If the mother has no action with the daughter at home under section 1 of the statute, she cannot maintain this action, because the daughter was living out at service: *Smith v. Crooker*, 23 U. C. R. 84; *Waters v. Powers*, 29 U. C. R. 336. The distinction between this case and *Hogan v. Aikman*, 30 U. C. R. 14, is that in that case the daughter was residing with the seducer.

An affidavit was read shewing, that before the trial negotiations were going on between the solicitors for both parties to try and settle the amount of damages, but that no agreement was arrived at although the defendant was willing to give \$300 and the plaintiff to accept \$500.

German, contra. *McIntosh v. Tyhurst*, cited by my learned friend, only decides that a step-father's right of action was not postponed for six months. There was nothing to show that the mother had not the right of action. There must be a right of action in the mother. Suppose the daughter was the servant of the mother, the mother has the right. As to the damages, all the negotiations between plaintiff's and defendant's solicitors were without prejudice. There should be no reduction of the damages. I refer to

Hope v. Davidson 33 U. C. R. 550; *Ford v. Gourlay*, 42 U. C. R. 552; *Fitzhenry v. Murphy*, 14 U. C. L. J. N. S. 22; *Metropolitan R. W. Co. v. Wright*, 11 App. Cas. 152.

Osler, Q. C., in reply. *Hope v. Davidson*, was a very gross case, and the daughter was persuaded away from home. The evidence here shows that this is not a case of seduction properly so called at all.

January 8, 1887. BOYD, C.—If the father is dead the mother of an unmarried female can maintain an action for the seduction of her daughter, though the daughter be serving or residing with another person at the time of the seduction. This is the plain intention of the statute, and it ought not to be defeated by the accident of the mother marrying again. If the daughter is out at service after the re-marriage of the mother, the mother's right still remains, as I read the Act, in all cases where the mother has not abandoned her daughter. The right of action is in the mother and if the step-father is joined, it can only be for conformity, and not because the right is his under the statute or at common law. When the statute says, "for whose seduction the mother could maintain an action in case such unmarried female were at the time dwelling under her protection," it puts hypothetically a case where a mother still treats the person seduced as her daughter, though not dwelling in the same house as a home. Such is or may be the present case, and nothing appears in evidence to the contrary. If the girl were living at home it may be under the present law that the mother would be the legal proprietor and head of the house, notwithstanding the presence of a second husband: *Donelly v. Donelly*, 9 O. R. 673. See also *Donelly v. Donelly*, 31 Sol. J. 45. Even if he were the master it may well be that the daughter resident there would be dwelling under the protection of her mother, so as to satisfy the language of the statute. There is no merit in the objection, and there are no words in the statute which compel us to give effect

to it. It has been practically overruled by the decision in *Hogan v. Aikman*, 30 U. C. R. 14.

In actions of this kind, the Court is reluctant for many reasons to grant new trials on account of excessive damages: *Evans v. Davies*, 17 W. R. 679. But after conferring with Mr. Justice Galt, I think we may adopt the course which was taken in *Hope v. Davidson*, 33 U. C. R. 550, and say that if \$1,000 is forthwith paid by the defendant into Court there may be a new trial, otherwise the application will be refused with costs.

PROUDFOOT, J.—A number of cases has decided that where a girl has been seduced while living with her mother and step-father, the mother has no right of action under the R. S. O., ch. 57, as she is not considered as residing with *another person*, the condition upon which the action is given to the mother. In such case the step-father may maintain the action as master. The cases are collected and commented on in *Hogan v. Aikman*, 30 U. C. R. 14. In that case, Richards, C. J., says, at p. 20: "I do not find any decided case in our own Courts that an action will not lie against a defendant who seduces a girl residing with him, whose father is dead, and whose mother has married again. * * * No action could be brought at common law, because the female seduced was not the servant of the step-father, or mother, and residing with them," and at p. 21: "Taking the whole statute together, I think, under it, the mother of the female seduced, when the father is dead, has a statutory right to bring the action, and any service or loss of service necessary to maintain it will be presumed to be hers, in her *quasi* representative capacity as mother, when the action is brought for the seduction of her daughter when residing with another person."

In that case it was not decided that the action could be maintained by the mother, joining the step-father for conformity, if the seduction took place after the marriage of the mother and step-father, the Chief Justice saying, p. 22,

"*if it should be necessary* to sustain the action that the seduction took place before the marriage, then the plaintiffs would be bound to prove it at the trial under the declaration." Nor was it decided that under such circumstances the action would not lie. But the whole scope of the reasoning would lead to the conclusion that it might.

The objection to the mother suing when the seduction took place while the female seduced was living with her mother and step-father, is that loss of service to the mother could not be alleged, but that has no application where the girl was residing with another person, as in the present case. Besides under the statute service is to be presumed, and evidence to the contrary is inadmissible.

Recent changes in the law altering the *status* of married women, cannot be entirely overlooked as giving her more enlarged powers, and diminishing to some extent the idea of complete merger of the wife in the husband that prevailed when these cases were discussed.

I think the plaintiffs have a right to maintain the action.

The damages are the peculiar province of the jury to determine. The amount awarded here seems large, and I would have been better satisfied if a less sum had been given. The subject is discussed in *Hope v. Davidson*, 33 U. C. R. 550, where a verdict of \$1,600 had been given against the defendant for seduction, with circumstances of aggravation. The Court hesitated about granting a rule *nisi*, suggesting that if the defendant would bring \$1,000 into Court to abide the result of a new trial, they might then think of granting it. The defendant stated on affidavit he was not in a position to pay the money into Court.

The rule *nisi* was then granted, but afterwards discharged. The Court say, p. 556: "If the defendant had proposed paying a sum of money into Court, in accordance with the views suggested in *Batchelor v. Buffalo and Brantford R. W. Co.*, 5 C. P. 127, we might have felt justified in granting a new trial, though in cases like these, Courts are unwilling to multiply trials if they can be avoided."

In the *Batchelor Case* damages to the amount of £6,178, had been assessed for injuries caused to the plaintiff through the negligence of the defendants. Macaulay, C. J., says, p. 129: "It is difficult to say here that the jury have acted upon any wrong principle, or been actuated by improper motives; still it does not appear to the Court that they have exercised a sound and reasonable discretion. The grievous bodily injury and suffering of the plaintiff may have influenced them in awarding so large a sum; no doubt it did, for there was little else laid before them on the subject. But, however attended with difficulty as a precedent for disturbing verdicts on grounds so peculiarly within the province of the jury, we have to consider that to confirm it might be to form another, which might prove inconvenient, and be in other points of view not reconcilable with the exercise of a sound judicial discretion."

In the present case the only witness was the female seduced, and she testified she had only seen the defendant three times before the act complained of, and then in the presence of other parties, and the first time she was alone with him she surrendered herself to his embraces. These circumstances should have been taken into account on the subject of damages. But from the amount awarded we think they must have been overlooked. The defendant has filed no affidavit shewing inability to pay. His solicitor, indeed, makes an affidavit that before trial negotiations were going on for a settlement, when the plaintiff would have accepted \$500 in full. But that may well have been in the hope of avoiding the exposure at the trial, and should not now bind him.

If the defendant deposits \$1,000 in Court to await the event of a new trial within a fortnight, and pays the costs of this application, he may have a new trial.

G. A. B.

[CHANCERY DIVISION.]

ST. DENIS V. BAXTER ET AL.

Findings of jury in answer to questions—R. S. O. ch. 50, s. 264—Recommendation of verdict—Entry of verdict by Judge on findings.

In an action for wrongful dismissal the jury found (1) That there was a final bargain made between the parties (2) That the plaintiff was to get \$900 a year ; and in answer to the question "It being a condition of the bargain that the plaintiff's term of service should end if he was not fit to do the duties of a captain, was the plaintiff fit to do the duties of a captain?" (3) "It has not been satisfactorily shewn by the evidence," and (4) The plaintiff was dismissed, and added as a rider the following, "Your jury believing that the plaintiff did not receive proper aid in the discharge of his duty, would recommend a verdict for plaintiff of \$100." The Judge entered a verdict for the defendants, and the plaintiff moved to set it aside ;

The Court being evenly divided, the motion to set aside the verdict was dismissed.

Per BOYD, C.—The onus was on the defendants to prove the unfitness and the jury, as is manifest by their recommendation, did not intend to pronounce against the plaintiff's competency. The findings were left in too uncertain a state to enter a verdict for either party against the will of the other. No material part of what the jury returns to the Judge should be disregarded.

Per PROUDFOOT, J.—The duty of the jury was completed when they answered the questions. It was for the Judge to determine what the legal result of the answers was. The jury's recommendation would rather seem to have been done more for sympathy for the plaintiff than with the desire of affirming his competency which they had previously found was not proved.

THIS was a motion to set aside a verdict entered for the defendants and for a new trial.

The action was brought by Louis J. St. Denis against Benjamin Baxter and Edward Baxter for the wrongful dismissal of the plaintiff who had been hired as a captain of one of the defendants ferry boats.

The action was tried at the Spring Assizes at St. Catharines on April 16, 1886, before Wilson, C.J., and a jury.

Rykert, for the plaintiff.

McClive, for the defendants.

The jury brought in answers to three of the four questions as set out in the judgment of Proudfoot, J. (where the facts

fully appear), in favour of the plaintiff, and to the other question which was in these words, "It being a condition that the plaintiff's term of service should end if he were not fit to do the duties of a captain. Was the plaintiff fit to do the duties of a captain?" To it they made the following answer: "It has not been satisfactorily shewn by the evidence," and added to their answers a rider in these words: "Your jury believing that the captain plaintiff did not receive proper aid in the discharge of his duty would recommend a verdict for plaintiff for \$100."

On these answers the learned Chief Justice entered a verdict for the defendants.

The motion was argued before the Divisional Court on December 9, 1886, before Boyd C., and Proudfoot, J.

Aylesworth, for the motion. On the answers to the questions there should be a verdict for the plaintiff or a discharge of the jury as on a disagreement. The plaintiff moves against the judgment but not against the findings. The answer to the third question is, that the evidence does not show whether the plaintiff was fit to do the duties of a captain. The defendants assumed the onus of proving that the plaintiff was not fit and they have not succeeded in doing so: *Millar v Toulmin*, 17 Q. B. D. 603.

Cassels, Q.C. The answer says that the evidence does not shew that the plaintiff was fit to do the duties. The \$100 recommendation of the jury was mere sympathy.

Aylesworth, in reply.

January 8, 1887. BOYD, C.—It appears to me improper to uphold the verdict entered for the defendants based upon the findings of the jury. The jury have answered three out of the four questions in favor of the plaintiff and against the evidence of the defendants. They find that the engagement was a yearly one, and that a final bargain was concluded between the parties, and that the plaintiff did not discharge himself from the defendant's service. The question is then left (the third), which is thus framed, "It

being a condition of the bargain that the plaintiff's term of service should end if he were not fit to do the duties of captain, was the plaintiff fit to do the duties of captain?" The answer is, "It has not been satisfactorily shewn by the evidence." That *per se* might imply that the plaintiff had not proved satisfactorily his fitness. Nevertheless the onus is on the defendants to prove the plaintiff's unfitness. But the jury add this supplement to their answers: "Your jury believing that the plaintiff did not receive proper aid in the discharge of his duty would recommend a verdict for plaintiff of \$100." This, to my apprehension, qualifies the answer to the third question, and leads to this conclusion, that the jury were unable to state whether the plaintiff was or was not fit, because he had not been furnished with proper aid in the discharge of his duties.

They were told by the Chief Justice in the closing words of his charge that if the plaintiff failed to fulfil the conditions as to competency they should find against him altogether. They manifestly do not intend to pronounce against his competency (as the ultimate result of their findings) because they recommend that the plaintiff have a verdict for \$100. They might have chosen to give a general verdict for this and have declined to answer the questions according to the old law in *Mayor, &c., of Devizes v. Clark*, 3 A. & E. 506, and for this reason it seems to me that some importance should be attached to that term of their deliverance, though it is true that now the Judge can limit them to finding on specific points: *Furlong v. Carroll*, 7 A. R. 145.

My own impression is, that the findings are thus left in too uncertain a state to enter a verdict for either party against the will of the other. If the effect of the findings and the rider accompanying is not distinctly to pronounce upon the issues involved so as to support a judgment for the defendant, there should be a new trial, unless, indeed, the defendant is content to let the verdict go to the plaintiff for \$100 as the jury recommend: *Bishop v. Kaye*, 3 B. & Ald. 605; *Diehl v. Evans*, 1 Serg. & R. 367, and *Ellyatt v. Ellyatt*, 3 Sw. & Tr. 503, cited in the judgment just pro-

nounced by the Divisional Court in *Toronto Brewing and Malting Co. v. Hevey (a)*, and *McQuay v. Eastwood*, 12 O. R. 402.

I have hesitated as to what precise effect, if any, should be given to the *addendum* to the answers. It does appear from what is said by Sir Robert Collier in *Connecticut &c. Co. v. Moore*, 6 App. Cas. 653, that the Court is to enter the verdict in accordance with what is deemed to be the true construction of the findings, coupled it may be with other facts which were taken as admitted, or were so clearly proved that no controversy could arise about them. This imports that the Court is not to deal with the findings isolated from everything else.

I cannot find any practice which justifies me in disregarding any material part of what the jury have returned to the presiding Judge. The expressions made use of by various Judges in different judgments rather lead to the conclusion that the whole is to be looked at and considered before judgment can be entered one way or the other. I refer to *Moore v. The Connecticut Mutual Life Ins. Co.*, 6 S. C. R. pp. 677, 685, 686, Gwynne, J.; and same case in 3 A. R. 263, Patterson, J.; and the language of the same Judge in *Canada Central R. W. Co. v. McLaren*, 8 A. R. 596; *Rosenberger v. Grand Trunk R. W. Co.*, 32 C. P. 349, 364, *per* Osler, J.; and *McLaren v. Canada Central R. W. Co.*, 32 C. P. 347, Galt, J. See also *Hollins v. Fowler*, L. R. 7 H. L. 772, and *Sheridan v. Pigeon*, 10 O. R. 632 (in which case, however, a general verdict was rendered by the jury).

I think there should be a new trial, unless the defendants are willing that the verdict should be entered against them for \$100. Costs will remain to be ultimately disposed of in the event of a new trial, as in *The Managers of Metropolitan Asylum District v. Hill*, 47 L. T. N. S. 29, H. L.

PROUDFOOT, J.—The plaintiff was engaged by the defendants as captain of a ferry boat across the Niagara River between Fort Erie and Black Rock, and counsel agreed

(a) See post p. 64.

that it was a term of the engagement that if the plaintiff was not fit he should be discharged. He was discharged, and brings this action for wrongful dismissal.

The case was tried before Wilson, C. J., and a jury.

Four questions were submitted to the jury, all of which were answered by them, and upon these answers the learned Judge entered judgment for the defendants.

The plaintiff now moves to set aside the judgment, and for a new trial.

The jury found, 1st, That there was a final bargain made between the parties; 2nd, That the plaintiff was to get \$900 a year. The third question and answer are as follows: "3. It being a condition of the bargain that the plaintiff's term of service should end if he were not fit to do the duties of a captain. Was the plaintiff fit to do the duties of a captain? Ans. It has not been satisfactorily shewn by the evidence:" 4. That the plaintiff was dismissed.

The jury, besides answering the questions, added the following: Your jury believing that the captain plaintiff did not receive proper aid in the discharge of his duty would recommend a verdict for plaintiff of \$100.

By the C. L. P. Act, sec. 264, the Judge may require the jury to answer questions, and the jury shall answer and not give a verdict.

The duty of the jury was completed when they answered the questions, and it was no part of their function to recommend what the verdict should be upon these answers.

The recommendation is therefore of no effect unless it can be considered as a qualification of their answers. All the questions, except the third, were answered in favor of the plaintiff. The third was answered in favor of the defendants, and the recommendation is a qualification, if any, of that answer.

I do not see why it was thought necessary to preface that question with the recital that fitness for the duties of captain was a condition of the bargain, unless it was merely a statement of the law, irrespective of any condition,

that the plaintiff must be capable of discharging the duty he engaged himself to perform: *Horton v. McMurtry*, 5 H. & N. 667. The answer, that it was not satisfactorily shewn by the evidence that the plaintiff was fit, was amply sustained by the evidence; and it was of peculiar importance that he should be well qualified, considering the dangerous navigation of that ferry, where want of capacity or fitness might not only cause loss of property but of life.

I have difficulty in conceiving how the belief of the jury that the plaintiff did not receive proper aid in the discharge of his duty is any qualification of their finding that he was not fit for the discharge of the duty. Better assistance might have enabled a competent man to discharge his duty with more ease, but it could not give competence to an incompetent man. The proper aid might have performed his duty for him, but he was not entitled to have that done.

Nor does it seem to me material that the recommendation indicates what the jury thought the verdict should be. They had nothing to do with that. The questions involved the law applicable to the case, and it was for the Judge to determine what the legal result of their answers was.

It is to be noticed also that the jury recommend a verdict for \$100 only, while the plaintiff's claim was \$570, and if entitled to anything that is the amount for which he should have had judgment. The jury in recommending the \$100 would rather seem to have done so through sympathy for the plaintiff than with the desire of affirming his competency and fitness for the duties of his position, which they had previously found was not proved.

I think the judgment should not be disturbed.

G. A. B.

[CHANCERY DIVISION.]

RUDD V. BELL ET AL.

Master and servant—Negligence—Foreman and fellow servant.

The plaintiff having had years of experience in running iron work machines and having been previously employed by the defendants in their wood working manufactory, hired a second time and was injured in working a jointer which he was told other men had been injured at. In an action against his employers

Held, that plaintiff knew from his own inspection and experience that the machine was dangerous, that it needed caution and firmness in operating; that the risks were open to his observation and that his opportunities and means of judging of the danger were at least as good as those of his employers, and a motion to set aside a nonsuit entered at the trial was dismissed.

Negligence on the part of a manager or foreman is not constructive negligence on the part of the master. Actual personal negligence of the master must be established as a foreman is but a fellow servant, though it may be of a higher grade.

THIS was a motion to set aside a nonsuit and for a new trial in an action brought by John Rudd, a workman, against his employers, W. Bell, A. W. Alexander, and W. J. Bell, for injuries received from machinery while in the employ of the defendants, on the ground that there was evidence to shew negligence on the part of the defendants.

The action was tried at the Fall Assizes held at Guelph, on November 25th, 1886, before Armour, J., and a jury.

G. W. Field and J. L. Murphy, for the plaintiff.

A. H. MacDonald, for the defendants.

The evidence went to shew that the plaintiff was hired to run a machine called a "Daniel planer" in the factory of the defendants: that he had some years before been in the employ of the defendants running a tenon machine, and for many years past had been employed in a sewing machine shop and elsewhere, using milling machines, drills, and lathes for iron working: and that when he first went to work for the defendants he was told by the foreman to run some pieces of wood through a jointer or buzz planer

which would have to be done before he could start on the "Daniel planer." Before starting he asked the foreman if there was any danger of a person being cut, and was told that people had been cut, but that he would be all right. The jointer was a machine in which knives were working on a revolving cylinder from underneath through a space or slot in an iron table and open to view as they appeared through the slot when not covered by the pieces of wood being planed. Plaintiff successfully ran a number of long pieces of wood through this planer, but when he came to some short pieces his hand was drawn into the machine and badly cut, so as to impair his future usefulness at his ordinary calling. The danger of injury to an inexperienced workman was in putting short pieces, six to eight inches long, through the machine. After the accident a guard was put upon the machine; but the evidence shewed it was not usual to have a guard on such machines when experienced men were working them, but that guards were used when inexperienced men were put to work; and that experienced men sometimes used a guard when putting short pieces through, and that it was not retained on this machine.

At the close of the plaintiff's case Mr. *MacDonald* contended there was no evidence to go to the jury, and the learned Judge being of opinion that there was no evidence of negligence, or if there was that it was the negligence of the foreman, dismissed the action.

From this judgment the plaintiff appealed by moving to set aside the nonsuit, and the motion was argued before the Divisional Court on December 10th, 1886, before Boyd, C., and Proudfoot, J.

J. L. Murphy, for the motion. There was evidence to shew negligence on the part of the master. The learned Judge was wrong in holding that it was the negligence of a fellow workman. The plaintiff's claim is simply for the actual or constructive negligence of the master. The machine was dangerous to an inexperienced workman, and

the master, through his foreman, was aware of it as well as of the inexperience of the plaintiff, and did not warn him. A master is not bound to insure the safety of a servant, and a servant is bound to take ordinary risks, but not risks which are not appreciable by him and of which the master has knowledge. A master must use care in the protection of servants. A servant does not assume risks that are not obvious. The machine which caused the accident was more dangerous than the one he was hired to work. The evidence shewed that experience in iron working machinery would not acquaint a man with the dangers of wood working machinery. I refer to: *Weems v. Mathieson*, 4 Macq. Sc. Ap. 215; *Clarke v. Holmes*, 7 H. & N. 937; *Grizzle v. Frost*, 3 F. & F. 622; *Sharp v. Pathhead Spinning Co.*, 12 C. of Sess. cas. 574; *Heske v. Samuelson*, 12 Q. B. D. 30; *Cripps v. Judge*, 13 Q. B. D. 583; *Murphy v. Smith*, 19 C. B. N. S. 361; *Wood's Law of Master and Servant*, 2nd ed., ss. 359, 360, 366, 367, 368; *Searl v. Lindsay*, 8 Jur. N. S. 746; *Railroad Co. v. Fort*, 17 Wallace 553; *Matthews v. The Hamilton Powder Co.*, 12 O. R. 58; *Hough v. Railway Co.* 100 U. S. 213; *Booth v. Boston and Albany R. W. Co.*, 67 N. Y. 593; *Harper v. Indianapolis and St. Louis R. W. Co.*, 44 Mo. 488; *Shaffer v. Haish*, 1 C. R. 607 (1); *Waldhier v. Hannibal and St. Jo. R. W. Co.*, 3 W. R. (2) 245; *Rummell v. Dilworth*, 1 C. R. (1) 905; *Brydon v. Stewart*, 2 Macq. Sc. Ap. 30; *Paterson v. Wallace*, 1 Macq. Sc. Ap. 748; *Clowers v. Wabash*, 3 W. R. (2) 416; *Atkins v. Merrick Thread Co.*, 3 N. E. R. (3) 29; *Jones v. Lake Shore* 14 N. W. R. (4) 551; *Pittsburgh R. W. Co. v. Adams*, 3 W. R. (2) 387; *Ormond v. Holland*, El. B. & El. 102; *Senior v. Ward*, 1 El. & El. 385; *Ashworth v. Stanwix*, 3 El. & El. 701; *Dynen v. Leach*, 26 L. J. Ex. 221; *Vicary v. Keith*, 34 U. C. R. 212; *Rowland v. Missouri, Pacific Co.*, 3 W. R. (2) 194; *Copper v. Louisville R. W. Co.* 17 N. R. (5) 749.

(1) Central Reporter. (2) Western Reporter. (3) New England Reporter.

(4) North Western Reporter. (5) North Eastern Reporter.

American publications not in Library.—R.E.P.

A. H. MacDonald, contra. The evidence shews the plaintiff was told that persons had been cut on the machine, and so he was warned. The defendants are not bound to take more than usual precautions, and they did take those. If the plaintiff was not obliged to work the jointer, as he says he was hired to run the Daniel planer, and if he did choose to work it, he was a mere volunteer, or if part of his engagement was to run the jointer he did not, in doing so, incur any greater risk than was known to him, and than is usually incident to the work of those employed on power wood-working machinery. A master is not liable for the inexperience or want of knowledge of a servant. In *Matthews v. The Hamilton Powder Co.*, *supra*, a director had a personal knowledge of the defect in the machinery; and that case sustains the principle that the knowledge of the servant is not that of the master, and that the servant's negligence does not render the master liable for an injury to a fellow servant. See also *Miller v. Reid*, 10 O. R. 419; *Priestley v. Fowler*, 3 M. & W. 1; *Seymour v. Maddox*, 16 Q. B. 326; *Ryan v. The Canada Southern R. W. Co.*, 10 O. R. 745, at 753. If the Judge is reasonably of the opinion that there was no negligence he has the right to withdraw the case from the jury. The plaintiff wholly failed to shew that the defendant's foreman was in any way incompetent.

Murphy, in reply.

January 8, 1887. *BOYD, C.*—In the case of a servant who enters into the service of a master who carries on a dangerous trade, the right of the servant to be protected in his person, is largely modified by the contract between master and servant. The servant is considered to contract that he will run all the ordinary risks arising from the nature of his master's business, and from the regulations under which it is carried on, and all risks arising from the negligence of his co-servants: *Mellish, L. J.*, in *Woodley v. Metropolitan District R. W. Co.*, 2 Ex. D. 391.

There is no cause of action on the part of the injured servant, unless it is alleged and proved that the danger which caused the accident was known to the master and unknown to the servant. Unless it is proved directly or by facts from which it may be inferred, that the servant was ignorant of the existence of the danger, he must be nonsuited: *Griffiths v. London and St. Katherine Docks Co.*, 13 Q. B. D., 261—Bowen, L. J.

The line of argument for the plaintiff was, that the machine on which the plaintiff was employed was of a peculiarly dangerous character, not appreciable by a person without experience of its working; that the defendant had knowledge of its dangerous character and did not, through his foreman or otherwise, warn the plaintiff of the risks he ran, and so has been guilty of culpable and actionable negligence.

I do not thus read the evidence. The machine was to some extent of a dangerous character, but it was so obviously; and the plaintiff was not an inexperienced workman to the knowledge of the employer, nor was he so in fact. He had been working at iron working machines for sixteen years, and had also worked for some days (seven or eight) three years ago on wood working machinery—such as is now in question—in the defendant's employment, and he was hired in the present service to work "a Daniel planer." He was set to work on the buzz planer in order to prepare pieces of wood for the Daniel planer; and after working about an hour and a half at the buzz planer he had his fingers cut by the knives. But the danger from the running of these knives was one of which the plaintiff could judge as much as the master. There was nothing latent or concealed. It was "a seen danger," open to his observation, and which it required no special skill or training to guage.

In cases where both parties have equal means of knowledge the rule is, that the master is under no obligation to provide for the safety of the servant to a greater extent than the servant is bound to provide for his own safety.

To this case the maxim *volenti non fit injuria* applies. The plaintiff was paid for the work he undertook; he knew from his own inspection and experience that the machine was a dangerous one, that it needed care, caution and, firmness in the operating. The risks were open to his observation, and his opportunities and means of judging of the danger were at least as good as those of his employer. His safety depended very much on himself, as he must have known. All these elements of hazard he must have observed when he undertook the work in which he was injured.

The cases relied upon by the plaintiff are all distinguishable from this. Most of them proceed on the duty of the employer when the person employed is of tender years and totally inexperienced in skilled labour, and others on the duty of the master in cases of defective machinery. The doctrine relied upon, in others of the States cases cited, as to the negligence of the foreman or manager being constructive negligence on the part of the master is not now recognised in the English Courts as part of the common law. Actual personal negligence of the master must be established; and it is not enough to suggest negligence on the part of the foreman, who is after all but a fellow servant, though it may be of a higher grade: *Allen v. The New Gas Co.*, 1 Ex. D. 251; *Howells v. Landore &c. Co.*, L. R. 10 Q. B. 62.

I agree with the Judge at the trial that there was no case to go to a jury, and that the plaintiff was rightly nonsuited. One must lament the mutilation of a workman, affecting his very means of earning a livelihood; but the Courts cannot for this reason so decide as to subject the employer of labour to burdens which the law declares he is exempt from.

PROUDFOOT, J.—The plaintiff's action is for injury received by him in working at a machine called a buzz planer in the manufactory of the defendants. The case came on for trial before Armour, J., who nonsuited the

plaintiff, holding that there was no negligence in the defendant, and if there were any negligence it was that of a fellow workman, for which the plaintiff could bring no action against the defendants.

The plaintiff now moves to set aside the nonsuit, on the ground that there was evidence to shew negligence on the part of the defendants.

The plaintiff is an iron worker. About three years ago he had been employed by the defendants, and then worked at a tenon machine for seven or eight days. He was again employed for the defendants a few days before the 24th March, 1886. He was engaged by Lockland, a foreman or manager of the defendant's factory. Lockland engaged him to work at a machine called a Daniel planer, and asked him what he had been used to do; and the plaintiff told him he had worked about thirteen years at the Osborne sewing machine shop, engaged in working at milling machinery, drills, and lathes. The plaintiff told Lockland he did not know anything of the Daniel planer, but he was quick at picking up and didn't know but he would soon understand it. The next day the plaintiff went to the defendant's factory and met King, who was a foreman in the room where the machine was, and who was to start him on the machine, as Lockland told him. King told him to go to work at a machine called a buzz planer where King said there were a number of pieces of wood to be run through before plaintiff could start on the Daniel planer. King told plaintiff to oil the machine. Plaintiff asked him if there was any danger of a person being cut; he said there had been people cut, but plaintiff would be all right. The plaintiff says he had never seen a machine like it before, it looked very simple to him. After working for about an hour and a half, when putting a piece of wood through the machine it drew his hand down into the knives, and the injury complained of was inflicted. The machine could have been rendered more safe by putting a guard on it, and one day after that the plaintiff saw a man working at it with a guard.

The foregoing is taken from the evidence of the plaintiff, and I do not think any of his witnesses put his case higher. The machine in itself was not a dangerous one; if carelessly used it might inflict injury: and it had cut several people before: and after the accident to the plaintiff it was, at least sometimes, used with a guard: and it is not alleged that the accident happened through any personal negligence of the defendants, but they are sought to be made liable for the negligence of their servants.

The master is bound to exercise due care for the provision and maintenance of proper materials, machinery, and plant for the work in and about which the servants are employed: *Bartonshill Coal Co. v. Reid*, 3 Macq. 266, 288; *Wilson v. Merry*, L. R. 1 Sc. App. at pp. 332, 334, 344. No breach of this duty is alleged; the machine was a proper one, fitted for the work it had to perform, and was in the condition in which it had been previously used by the defendants' workman.

The master is also bound, in the event of his not personally superintending and directing the work, to select proper and competent persons to do so: *Wilson v. Merry. supra.*

It is not shewn that there was any breach of duty in this respect. Lockland and King appear to have been perfectly competent to perform the duties of their positions.

Assuming for the present that the negligence of Lockland or King would make the defendants liable. Is there evidence of such negligence?

Lockland was aware that the plaintiff had been engaged in a machine shop for thirteen or fourteen years, not indeed of the same kind as the defendants, but where the machines were run by steam power, and he knew the danger of working with such machinery. The plaintiff inquires if there is danger of injury, and is told that some persons had suffered, but that he would be all right. A very natural expression when aware that the plaintiff was acquainted with power machinery, and would exercise

care in working with it. The plaintiff was put on his guard. There was no attempt at concealment.

The plaintiff's ignorance of the risk, or, at any rate, non-acquiescence in it, is as essential to his right of action as the fact of the master's knowledge : *Griffiths v. London and St. Katherine's Docks Co.*, 13 Q. B. D. 259 ; *Miller v. Reid*, 10 O. R. 419 ; but as we have seen the plaintiff knew of the hazard and did not decline to run the risk.

But, however, that may be, the defendant is not answerable to the plaintiff for the negligence of a fellow servant. As between himself and his master, he undertakes to run all the ordinary risks of the service, and this includes the risk of injuries caused by negligence on the part of a fellow servant, when he is acting in the discharge of his duty as servant of him who is the common master of both : *Hutchinson v. York, W., &c., R. W. Co.*, 5 Ex. 353, 19 L. J. Ex. 296.

When the workman contracts to do work of any particular sort, he knows, or ought to know, to what risks he is exposing himself. He knows, if such be the nature of the risk, that want of care on the part of a fellow workman may be injurious or fatal to him, and that against such want of care his employer cannot by any possibility protect him : *Bartonskill Coal Co. v. Reid*, 3 Macq. 266.

Assuming that Lockland and King were clothed as foremen, with a more extensive authority by the master, and occupied the position of vice-principals, their negligence makes no difference as to the master's non-liability ; and no matter how far superior the rank of the negligent person may be, he is still for the purposes of the present subject the fellow servant of the other : *Searle v. Lindsay*, 11 C. B. N. S. 429 ; *Feltham v. England*, L. R. 2 Q. B. 33 ; *Matthews v. Hamilton Powder Co.*, 12 O. R. 58.

Where accidents have happened, it may be the duty of the employer to make use of additional safe-guards ; but it does not follow that the mere fact of the adoption of increased precautions after an accident of itself proves negligence in the non-adoption of these precautions be-

fore: *Hart v. The Lancashire and Yorkshire R. W. Co.*, 21 L. T. N. S. 261. It may constitute some evidence of a want of due care; but as I have been unable to find any want of due care, this does not of itself prove it.

If the plaintiff had been a person going into a machine shop for the first time, ignorant of the force of power machines, the case might have presented a different aspect.

This case is not affected by the provisions of the Act to secure compensation to workmen in certain cases, 49 Vic. ch. 28, (O.) as that Act did not come into force till some time after the accident happened—viz., 1st of July, 1886.

I have read a number, but not all the cases that were cited to us by the counsel for the plaintiff, but those that I have cited above, are in my estimation sufficient to shew that the nonsuit was right.

G. A. B.

[CHANCERY DIVISION.]

MCMULLEN v. FREE.

Damages to present crop—To farm permanently—Evidence of—Improper rejection—Action by mortgagor—Joinder of mortgagee—O. J. A. s. 17 s-s. 5.

Plaintiff bought seed barley from defendant guaranteed to be clean. The seed was sown and it was afterwards discovered that it was mixed with a weed called wild vetches or wild peas, which took root and grew up with the barley.

In an action to recover damages for depreciation in the value of the farm the evidence shewed that the plaintiff had not sustained any damage to his crop, but he tendered evidence to shew depreciation in the value of the farm which the learned Judge refused to receive.

On motion for a new trial.

Held, (reversing the judgment of GALT, J.) the plaintiff should have been allowed to substantiate if he could that the necessary consequence of sowing the foul seed was to lower appreciably the value of the farm.

On the argument it was contended that as the farm was mortgaged the plaintiff (mortgagor) could not maintain the action.

Held, that in equity the mortgagor is the owner in a case like this where the land is worth considerably more than the mortgage, and it is for the Judge to direct the mortgagee to be added as a party or to direct the sum recovered to be paid into Court for his protection if it appears that his interests are being affected prejudicially by the litigation, but it is no reason for dismissing the action, and a new trial was ordered.

THIS was an action brought by George W. McMullen against William Free for damages to a farm caused by sowing barley purchased from the defendant which was mixed with a weed called wild vetches or wild peas.

The action was tried at the Fall Assizes of 1886, at Cobourg, before Galt J. and a jury.

Riddell, for the plaintiff.

Clute, for the defendant.

The plaintiff's evidence went to shew that he purchased seed barley from the defendant, and that when he purchased it the defendant said it was clean, and that he would guarantee it; that the seed was sown on the plaintiff's farm and it was not discovered that it was not clean until the crop came up, when a weed called wild vetches or wild

peas was found growing among the barley. The plaintiff admitted in his evidence that his crop for that year was not injured, and was going on to show that the value of the farm was depreciated by the introduction of the weed, when he was stopped by the Court.

Mr. Riddell offered evidence to shew that the necessary consequence of sowing the weed was a depreciation in the value of the farm.

His Lordship refused to allow such evidence to be given as only supporting speculative damages, and held that unless the plaintiff shewed damages at the time he brought his suit he could not maintain his action and as the plaintiff's answer to a question from his Lordship was "I have sustained no damage," he dismissed the action.

The plaintiff moved for a new trial and his motion was argued before the Divisional Court, on December 7, 1886, before Boyd, C. and Proudfoot, J.

Riddell, for the plaintiff. The learned Judge was wrong in refusing to allow plaintiff to give evidence of depreciation in the value of the farm. The measure of damages is the difference in the market value; *Mayne on Damages*, 3rd ed. p. 14, and it is no answer to say that the earning power is the same. I should have been allowed to explain the plaintiff's answer that he had sustained no damage, and to show how much the farm had depreciated, and to have gone to the jury.

Clute, for the defendant. The plaintiff cannot maintain an action for depreciation to the farm as the title to it is not in him, he having mortgaged it [BOYD, C.—Perhaps that might have made a difference before the Judicature Act.] The test is, Was there any damage to the reversion and if so the mortgagee should have brought the action. The statement of claim shows that the action is for damage to the plaintiff's possession, and it is proved there was no damage to that—plaintiff's answer is sufficient there was no damage. [PROUDFOOT, J.—But that answer is capable of explanation.] I refer to *Rogers v. Dickson*, 10 C. P. 481,

and cases there cited, *Perry v. The Bank of Upper Canada*, 16 C. P. 404; *Plumb v. McGannon*, 32 U. C. R. 8.

Riddell, in reply. The fact that the farm was mortgaged is no answer to the action. The mortgagee has not taken possession or given any notice of his intention so to do: O. J. A. sec. 17, sub-sec. 5, *Fairclough v. Marshall*, 4 Ex. D. 37, 49.

January 8, 1887. *BOYD, C.*—The plaintiff, a farmer, bought seed barley from the defendant, a farmer, in the spring of 1886, and complains that the defendant fraudulently sold him seed which was mixed with the seed of a foul and noxious weed, by the sowing of which he sustained damages. He admits that he sustained no loss in his crop for that year, but he asserts, and seeks to prove that his farm has permanently depreciated in value by means of the introduction of this weed into his soil to the extent of \$1,000. The Judge, regarding his admission that no loss of crop had followed when the action was brought, as conclusive against his right, directed a non-suit on the plaintiff's evidence, and appeared to regard the further claim as one of a speculative character. I think that the case should not have been withdrawn from the jury at that stage. The plaintiff should have been allowed to substantiate by the witnesses he had in Court (if he could do so), that the necessary consequence of sowing the foul seed was to lower appreciably the value of the farm. *Randall v. Raper*, E. B. & E. 84, is the leading case as to seed-grain. There the measure of damages was held to be the inferior crop, and that satisfied all the damages resulting from the sale of an inferior seed. The Court ascertained to what extent damages should be recovered by considering what would be the probable, the natural, or the necessary consequence of the seed not being as represented. One of the latest cases is *Wagstaff v. Short Horn Dairy Co.*, 1 Ca. & El. 324. The principle of *Randall v. Raper* was applied to the case of selling disease-infected cattle. It was held in *Smith v. Green*, 1 C. P. D.

92, that a defendant selling a cow to the plaintiff with warranty that she was free of disease, was liable in damages for the entire loss occasioned to the plaintiff's herd, if when he sold he knew that the plaintiff was a farmer and that he would, or probably might place the infected cow with others. To the same effect is *Randall v. Newsom*, 2 Q. B. D. 102.

In the present case, it is competent for the plaintiff to prove that the natural and normal result of sowing the unclean seed bought from the defendant as good and proper seed, was to introduce upon his land such an injurious and irradicable root as to affect the land more or less permanently, and for that he is entitled to such substantial damages as the jury may find. This element of damages is not speculative, or too remote to be disregarded, but would flow in the ordinary course of things from the act of the defendant, dealing as he is said to have done with the plaintiff. There should be a new trial, reserving the costs as usual.

I have omitted to refer to the point urged before us that the plaintiff had mortgaged his land and therefore had no right of action. This was not the ground upon which the learned Judge proceeded at the trial, and it is not a fatal or irremediable objection, even if it should prevail to any extent. In equity the mortgagor is the owner in a case like this, where the land is worth double the mortgage. It is for the Judge to direct the mortgages to be added, or to direct the sum recovered to be paid into Court for his protection, if it appears that his interests are being affected prejudicially by this litigation. It is not a reason for dismissing the action or giving judgment against the plaintiff. I refer to the Judicature Act, sec. 16, sub-sec. 5; sec. 17, sub-sec. 5, *Fairclough v. Marshall*, 4 Ex. D. 37; *Platt v. The Grand Trunk R. W. Co.*, 12 O. R. 119; *Bennett v. Hughes*, 2 Times Rep. 715.

PROUDFOOT, J.—Motion for a new trial for rejection of evidence, &c

The action was for damages for selling foul barley seed, which the defendant had warranted clean. There was found to be mixed with the barley the seed of a most noxious weed, commonly known as wild peas—which, after it once gets into a farm it is almost impossible to eradicate.

The plaintiff did not discover the presence of the wild peas until after the seed had been sown.

At the trial the plaintiff on his examination said that it had not appreciably affected the crop of barley with which it was sown. The learned Judge would not allow evidence to be given to show that although it had not caused much if any damage to that crop, it had much deteriorated the value of the farm.

Upon the argument of this motion counsel for the defendant contended that the plaintiff could only bring an action for injury to the crop, not to the farm, as there was an outstanding mortgage.

It was not argued that the damage to the farm was too remote.

Where the mortgagee has not taken possession and has done nothing but left the property in the hands of the mortgagor, the mortgagor may put in force all the rights of property involved in the ownership of the land. If there were any suggestion that the action might affect the security of the mortgagee, it might be necessary that he should be joined, but the plaintiff's action should not have been dismissed. But there is no suggestion that the action will injure the mortgagee's security. The act of the defendant is that of which the mortgagee would have to complain, not the proceeding of the plaintiff to make the defendant answer in damages for that act.

Fairclough v. Marshall, 4 Ex. D. 37, was an action for an injunction to restrain the defendant from using a certain house as a beer house. The plaintiff was in the position of a mortgagor. The mortgagee had not taken possession. The covenant, of which the defendant had notice, and by which he was bound, was that no building on the plot of ground shall at any time be used as a public house or tavern,

beer house, or house for the sale of beer, or coffee house, without the consent of the vendor in writing. The Court of Appeal held that that the plaintiff alone could maintain the action. Cotton, L. J. says, p. 48 "We are here to recognize equities, and to deal with substance rather than form. It is not the mortgagees who are the owners, but the mortgagor. The mortgagor is the beneficial owner, subject to the encumbrance, and the plaintiff is in the position of a mortgagor having the beneficial ownership of a rent issuing out of the land and certain other benefits."

It would seem, therefore, upon general principles, that in such an action as the present the plaintiff has the right to sue alone unless the mortgagees choose to interfere. If otherwise the action should not have been dismissed, but the mortgagees should have been required to be added.

In *Fairclough v. Marshall*, the Court seems to have doubted whether the section in the English Judicature Act equivalent to our sec. 17, sub-sec. 5, applies to a breach of covenant, such as was there complained of, for the plaintiff not suing for possession, nor for rents, nor for damages in respect of any trespass, that the other ground of action given him for any *other wrong* relative thereto did not apply to such a breach of covenant.

Bramwell, L. J., says, at p. 45: "If by that sub-section the mortgagor may sue for possession or rents and profits, or in respect of trespass or other wrong, meaning wrong independent of any contract or duty, it is possible that the mortgagor may sue for rents and profits, but not for breach of covenant to insure against fire or to repair. I do not think this can have been meant, and perhaps hereafter that consideration may induce the Court, when the question is properly raised, to put some other construction on the word 'wrong.'" And Brett, L. J., says, at p. 47: "That is not an enactment to prevent parties from suing who could have sued alone before the Act. It is an enabling not a disabling section."

The inclination of their opinion seems to have been that the section was wide enough to comprehend all actions

relative to the property which formerly could have been bought by the mortgagor, or mortgagee, or both jointly; not merely to the possession of the property, and it seems to me that such was the intention of the section. It enacts that a mortgagor entitled for the time being to the possession or receipt of the rents and profits of *any land* as to which the mortgagee has given no notice of his intention to take possession, may sue for such possession, or sue for the rents, or to prevent or recover damages in respect of any trespass or other wrong *relative thereto* in his own name. "*Relative thereto*" is not confined, I think, to the possession, or to the rents and profits, but applies also to the land itself. And the learned Judges in *Fairclough v. Marshall*, appear to have been of that opinion, for if the act complained of there, which was not a trespass to the possession, but was a wrong to the land arising from a breach of covenant, had not arisen from a breach of covenant, they would have held the action lay.

However, either upon general principles or under that section, I think the action maintainable, and that the action should not have been dismissed.

There should, therefore, be a new trial, and, as the evidence was erroneously rejected by the learned Judge, the costs should abide the event.

And see *Platt v. The Grand Trunk R. W. Co.* 12 O. R. 119-127.

G. A. B.

[CHANCERY DIVISION.]

THE TORONTO BREWING AND MALTING COMPANY V. HEVEY.*Principal and surety—Representation on which bond executed—Jury findings.*

The defendant agreed to become security with McG. for McB. to the plaintiffs. Plaintiffs' solicitor sent two bonds to their agent for execution, one by defendant, the other by McG. The agent attended defendant to get his bond executed, and in answer to a remark of defendants (made before he signed the bond), that McG. had promised to sign a bond too, told him that a bond had been sent up to be signed by McG. Defendant then signed the bond, but McG. subsequently refused to sign his.

The jury found that a statement was made leading defendant to suppose that the bond executed was conditional upon the execution of the proposed bond from McG., and that its execution was obtained by a false, although unintentionally so, representation.

Held (affirming the judgment of O'CONNOR, J.), that the plaintiffs could not recover.

THIS was an action brought by the Toronto Brewing and Malting Company against Christopher Hevey on a bond.

The action was tried at the Fall Assizes of 1886, at London, before O'Connor, J., and a jury.

Kingsford, for the plaintiffs.

Osler, Q. C., for the defendant.

At the trial it appeared that the defendant had agreed to become surety with one McGoey for one McBean to the plaintiffs who were furnishing goods to McBean, and that two bonds had been sent from Toronto by the plaintiff's solicitors to their agent, Mr. Marsh, a solicitor in London, for execution, one by the defendant and one by McGoey; that when Mr. Marsh went to the defendant to execute his, he (the defendant) remarked that McGoey had promised to sign a bond too, and Marsh then told him that a bond had been sent up for McGoey to sign, and defendant then signed the bond: that McGoey afterwards refused to sign his bond.

The following were two of the questions left to the jury:

1. Was any statement made on the part of the plaintiffs leading the defendant to suppose that the bond executed was conditional and only to go into effect upon the execution of the proposed bond from McGoeys or some other surety?

2. Was the execution obtained by any false representation?

The first of these questions was answered "Yes," and the second "Yes, but unintentionally, by Mr. Marsh."

A judgment was entered for the defendant.

Against this judgment the plaintiffs appealed to the Divisional Court, and the appeal was argued on December 6th, 1886, before Boyd, C., and Proudfoot, J.

James MacLennan, Q. C., and *Kingsford*, for the plaintiffs. There is no evidence to warrant the findings of the jury. There should be a mutual understanding that there was to be two bondsmen: *Sidney Road Co. v. Holmes*, 16 U. C. R. 268; *The Corporation of the County of Huron v. Armstrong*, 27 U. C. R. 533; *Evans v. Bemridge*, 8 D. M. & G. 109, 2 K. & J. 174. Even if there was any concealment of material facts it must be shewn that such concealment was fraudulent: *The Municipal Corporation of East Zorra v. Douglas*, 17 Gr. 462; *Peers v. Oxford*, 17 Gr. 472; *Pollock on Contracts*, 4th ed. 521; *Hamilton v. Watson*, 12 Cl. & F. 109; *De Colyar's Law of Guarantees*, pp. 174-5. Parol evidence should not have been admitted here. Even if Mr. Marsh had made any representation the plaintiffs would not be bound by it.—[BOYD, C. J., I think the law is plainly the other way.]

R. Meredith, for the defendant. The Court has no power to enter a verdict against the findings of the jury: *The Connecticut Mutual &c., Co. v. Moore*, 6 App. Cas. 644. The cases cited by my learned friends were where the debtors obtained the bonds and forwarded them without the intervention of the creditors. Here the plaintiffs and their solicitor did everything, but they got an incomplete bargain, only one bond being signed, and they did not inform Hevey. In *Bonser v. Cox*, 4 Beav. 382, the repre-

sentation was that the principal debtor was to be held by bond and not by simple contract. *Emmet v. Dewhurst*, 3 McN. & G. 587, was a case very much like this. A completely executed instrument may be completely controlled by a parol agreement: *McNeely v. McWilliams*, 13 A. R. 328. I refer also to *Piper v. Simpson*, 6 A. R. 175; *Blest v. Brown*, 8 Jur. N. S. 603; *Railton v. Matthews*, 10 Cl. & F. 934.

MacLennan, Q. C., in reply.*

January 8, 1887. BOYD, C.—The form of the transaction in that two bonds were to be executed, one by each surety, is not material in view of the position of the sureties in equity. The transaction as understood by the defendant was not one of mere several obligation on his part, but one in which he was to be bound with a joint obligor, against whom he would have, by the terms of the original contract, a right of contribution. The omission to procure the other surety was directly contrary to the intention of the parties as found by the jury, and it is inequitable to seek to hold the one who has alone signed, bound by a contract to which he did not intend to become subject: *Underhill v. Horwood*, 10 Ves. 225, 226. The point is thus treated by James, L. J., in *Ex p. Harding*, 12 Ch. D. 564. "If three persons sign a document and it is said they are not liable, because the intention always was that they should not be liable unless some other person should also sign, that is, an equity to get rid of a legal liability." I also cited the language of Field, J., in *Beckett v. Addyman*, 9 Q. B. D. 789: "It is enough if it appears that a material term upon faith of which the surety came under his contract has been negligently departed from by the creditor, by whose omission to procure the execution by the co-surety the position of the executing surety is materially altered for the worse."

* There were other arguments and many cases referred to on other points, but as they are not alluded to in the judgments, they have been omitted.—Rxp.

The findings of the jury upon the first two questions submitted, manifest that they were impressed by the broad fact that the defendant never proposed or intended to become liable to any greater extent than as one of two sureties for \$2,000, and that this was known to the plaintiffs through their agent.

These answers indicate their conclusion that the defendant signed the bond of suretyship upon the assurance made on behalf of the plaintiffs that McGoey (the other intended surety) had already signed, or would forthwith sign his part of the obligation. In the one case there would be an untrue representation of a fact which would mislead the defendant: in the other case, it is a matter of reasonable and proper inference from all the circumstances that the signature so made and obtained was a conditional one, not to be operative till the other surety had completed the transaction of joint suretyship. The distinction between the statement that McGoey had signed, and the assurance that he would sign, being not so marked or important to the lay as to the legal mind, it may well be that the jury confused the two in their answers. But there is no difficulty in ascertaining that they have declared that the signature of the defendant was procured in such a manner that he ought not to be bound. That being so, the observations of the Judge Ordinary, in *Ellyatt v. Ellyatt*, 3 Sw. & Tr. 503, apply in which he said: "The jury have found a verdict, which is certainly not strictly consistent. Such an occurrence is not uncommon, and it often happens that the inconsistency of the verdict is such that the Court cannot see clearly what was the substantial opinion of the jury—the inconsistency being such as to obscure the whole decision of the jury. In such a case, the only remedy is to submit the case to another jury. It does not follow, however, as a necessary consequence because the finding of a jury is inconsistent that their substantial opinion cannot be ascertained." Other matters were argued, but I prefer to place my judgment on the ground I have indicated.

The result is that the application should be refused, and the judgment affirmed, with costs.

PROUDFOOT, J.—This action is brought against the defendant upon a bond signed by him to indemnify the the plaintiffs against any losses they might sustain through an agent, McBean. At least that is the manner in which the plaintiffs construe the language of the instrument, though it may be doubted if that is its true effect. But for the purpose of this motion, I will assume that to be its object.

One defence is, that the bond was to have no operation, unless another bond of similar purport was executed by one McGoey or another surety, which was not done.

The case was tried before O'Connor, J., and a jury, and upon the answers given by the jury to several questions submitted to them, the learned Judge entered a verdict for the defendant.

A motion is now made to enter a verdict for the plaintiffs or for a new trial.

Among other things the jury found that the defendant executed the bond upon the understanding that another bond was to be executed by another surety.

But the plaintiffs say that parol evidence of such an understanding was not admissible, as its effect would be to alter the terms of the bond. And also that there was no evidence to justify that finding of the jury.

I think the evidence admissible. The rule as formulated in *Addison* on Contracts, p. 937, 6th ed., is, that if two parties sign a memorandum of a contract upon the strength of a clear oral agreement that the writing is not to be binding until the happening of a given event, and the event never happens, there is no contract. And in *Mason v. Scott*, 22 Gr. 592, 619, in appeal, the late Chief Justice Harrison expresses himself nearly in the same terms: "I fully understand the cases which decide that oral testimony may be given to show that, owing to some oral agreement, a written agreement, though signed, is not to take

effect as an operative agreement till the happening of some event which did not happen, and this on principles analogous to the doctrine of escrow ;" and he refers to a number of the cases cited by Addison.

This statement of the law is so clear, and the principle is now so well recognized, that I do not think it necessary to examine the cases in detail.

It is thus reduced to a question of fact, and I think there is sufficient evidence to warrant the finding of the jury.

The solicitor for the plaintiffs sent to their agent in London, Mr. Marsh, two bonds in duplicate to get executed, one by McGoeey, and the other by Hevey. Marsh called first on Hevey and took the bond to him and told him it was sent up to take to him for signature, and he read it over and signed it. Hevey looked over the bond and reading down to the words "malfeasance and misfeasance" asked Marsh what was the meaning of those words ; Marsh told him, and then he said McGoeey promised to sign a bond too. Marsh told him a bond had been sent up to take to McGoeey for signature. McGoeey afterwards refused to execute the bond sent for his signature.

The sending of the two bonds for signature—the communication of that fact to Hevey—his statement at the time of signature that McGoeey was to sign a bond too, were facts from which the jury might well find that the defendant's bond was only to go into operation upon the execution of the proposed bond from McGoeey or some other surety,

I do not think the judgment should be disturbed, or that there should be a new trial.

G. A. B.

[CHANCERY DIVISION.]

RE CANNON, OATES V. CANNON.

Champerty—Administration action—Champertous agreement to get control of a claim on which to apply for administration order—Petition to set aside administration order—Creditors rights thereunder—Champertous claim disallowed.

O. assuming that the firm of T. & O. of which he was a member, had a small claim of about \$300 against the estate of A. M. C., a deceased intestate ascertained that H. & Co. had a large one of over \$7000 on promissory notes, and tried to induce H. & Co. to join him in an action for the administration of A.M.C.'s estate which they declined to do. H. & Co. offered to sell their claim to him for \$2000, which offer O. refused to accept, but finally, without the payment of any valuable consideration, obtained an assignment of H. & Co.'s claim for the purpose of collecting it, under an agreement by which he was to pay H. & Co. one half of the amount collected on said claim after payment of costs. H. & Co. did not make themselves responsible for any costs. O. obtained an administration order against M. E. C. the administratrix of A. M. C. who, not knowing anything of the claim on the H. & Co. notes, did not resist the making of the order; but when the facts were elicited in the Master's office, and when O.'s own claim was disallowed by the Master, filed a petition to have the order set aside on the grounds of champerty. *Held*, that as a decree for administration is for the benefit of all the creditors, and as another creditor had established a claim under it, the administration order could not be set aside.

Held, also, that the agreement between O. and H. & Co. was champertous or so strongly savouring of it that it could not be maintained, and that O. could not prove on the notes in this administration suit.

Regnell v. Sprye, 1 D. M. & G. 671, and *Hutley v. Hutley*, L. R. 8, Q. B. 112, considered.

THIS was a petition by the defendant, Mary Ellen Cannon, to set aside the administration order obtained by the plaintiff in this action against her as administratrix of A. M. Cannon, on the ground that he had obtained the notes in respect of which he obtained the order, and claimed as a creditor of the Cannon estate under a champertous agreement, which was only entered into for the purpose of enabling him to obtain such administration order.

The petition was argued at Toronto on September 29th, 1886, before Proudfoot, J.

McMichael, Q.C., and *A. Hoskin*, Q.C., for the petitioner. The plaintiff made his application for the administration

order upon a claim of about \$7,000 which he had procured from Messrs. Howland & Co., to enable him to take these administration proceedings. The firm of Taylor and Oates, of which he is a member, attempted to prove a small claim in the Master's office; but that claim has been disallowed by the Master, so that the plaintiff's claim now rests on the Howland notes alone. He tried at first to induce Howland & Co. to join him in this action, but they would not do so. He then, without paying anything for them, arranged for a transfer of the notes to himself, with a view to his trying to collect them upon an agreement that if he succeeded in doing so, he was to pay Howland & Co. half of what was realized after payment of costs, but Howland & Co. did not in any way make themselves responsible for any costs. That was a champertous agreement, and Oates got no title to the notes such as would enable him to prosecute this action. The defendant had previously advertized for creditors and duly administered the estate of the intestate, and the first she heard of the plaintiff's claim was the notice of application for the administration order. The defendant knew nothing then of the facts, and the administration order was granted, and this petition is to set it aside. [PROUDFOOT, J.—But the Master should consider the question of champerty.] The Master held that the notes had been recognized as valid claims when the Court granted the order, and it was not for him to dispute that, and the defendant would have to come to the Court. The suit should not be allowed to proceed. Champerty is one species of maintenance. The evidence of the plaintiff shews that everything necessary for champerty is present here. The derivation of the word, *campum*, *partire*, to divide a field, is exactly what they did here, viz, divided the field. Even maintenance is sometimes justified where champerty is not. A man may, for affection, sometimes maintain an action by a brother or relation where he thinks he has an interest, but no case justifies champerty : *Hutley v. Hutley*, L. R. 8, Q.B. 112. The law on this subject is still in force in full strength : *Bradlaugh v. Newd-*

egate, 11 Q. B. D. 1; *Sprye v. Porter*, 7 E. & B. 58; *Prosser v. Edmonds*, 1 Y. & C. 497; *Harrington v. Long*, 2 My. & K. 590; *Hilton v. Woods* L. R. 4 Eq. 432. Where a plaintiff sues by virtue of title under a champertous contract, he has no title: *Reynell v. Sprye*, 8 Ha. 222; 1 D. M. & G. 660. When after decree plaintiff is found to have no title, suit may be stayed: *Houseman v. Houseman*, 1 Ch. D. 535; *De Hoghton v. Money*, L. R. 1 Eq. 154; L. R. 2 Ch. 164. Administration cannot be procured for an illegal debt; *Smith v. White*, L. R. 1 Eq. 626. In *Graves Wright*, 1 Con. & Law. 267, plaintiff brought administration as a creditor, and was found a debtor, and had to pay costs, but the proceedings stood for the benefit of others. Here Taylor and Oates's claim is disallowed; Howland's claim is champertous, and Taylor's individual claim is barred by the former suit where the defendant proved she had duly administered the estate. A plaintiff in an administration action must prove his claim. The administration order does not establish it. See also *Dixon v. Wyatt*, 4 Mad. 392; *Smith v. Guy*, 2 Cooper 289; *Cardell v. Hawke*, L. R. 6 Eq. 464.

Foster, Q. C., and *J. B. Clarke*, contra. Howland & Co.'s claim was purchased for a sum equal to half of what should be realized. Such an arrangement was not champertous. There was no offence of "the mind" as some of the cases put it. Outside of that the plaintiff had or believed he had in right of his firm a *bond fide* claim, and it was only owing to weakness in its proof that it was disallowed. Thinking he had one of his own, how could the purchase of the other be construed into a purchase for the purpose of bringing the action? The only object was to prevent any other large creditor coming in and taking advantage of his exertions. It was a fair bargain and the purchase did not necessitate a suit; the plaintiff had that right without it. There was no indemnity to the Howlands against costs. The elements of champerty are summarized in *Torrence v. Shedd*, 112 Ill. 466, and this case is not covered: *Tapping* on *Mandamus*; *Reynell v.*

Sprye, supra. A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy; *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, 2 App. Cas. 186. In *Hare v. London and North Western R. W. Co.*, 1 Johnson 722 the plaintiff purchased shares for the express purpose of filing a bill on behalf of himself and all other shareholders and that was held not to be maintenance. The Master has made no report yet and he may be wrong in disallowing plaintiff's own claim. Oates had such an interest as allowed him to purchase Howland & Co's. claim, and the result of the proof of his own claim had nothing to do with it: *Findon v. Parker*, 11 M. & W. 681; *Hunter v. Daniel*, 4 Ha. 420; *Langtry v. Dumoulin*, 7 O. R. at 661; *Harper v. Culbert*, 5 O. R. at 160. None of the cases cited on the other side go so far as to say that when a party has already an interest he cannot purchase a further claim. The assignment passed the whole interest of Howland & Co. which was a substantial interest and not a mere right to litigate: *Muchall v. Banks*, 10 Gr. 25; *Little v. Hawkins*, 19 Gr. 267. As to part of the proceeds going back to Howland & Co., see *Ward v. Hughes*, 8 O. R. 138. The nature of the proceedings, administration, shows it was not champerty: *Hare v. London and North Western R. W. Co.*, *supra*.

McMichael, Q. C., in reply. There was a risk in the matter as is shown by the plaintiffs refusal to accept Howland & Co's. offer to sell out and out, for less than one third of the face value of the claim. All the risk the plaintiff would run was the costs.

October 23, 1886. PROUDFOOT, J.—This is a petition to set aside an order obtained by the plaintiff for the administration of the estate of Andrew M. Cannon, upon the ground that the plaintiff obtained the notes upon which he

bases his right as a creditor under a champertous agreement, and that he was not, when he gave notice of his application for an administration order, nor at any time since, the lawful holder of these notes.

The circumstances set forth in the petition are, that the petitioner, the defendant, is the widow of A. M. Cannon, who died intestate on the 29th December, 1882: that she obtained letters of administration to his estate on the 17th January, 1883: that she realized the assets and paid all the debts she knew or had notice of, after advertising for creditors. Neither the plaintiff nor W. P. Howland & Co., nor Taylor & Oates, nor Walter Taylor, nor any one on their behalf, sent in any claim, and the petitioner had no notice or knowledge that they had, or pretended to have any claim.

In 1884 Walter Taylor brought an action against the petitioner for a large sum of money, which was defended by the petitioner, and amongst other pleas she pleaded that she had fully administered the estate, and this defence was at the trial found in favour of the petitioner. In June, 1884, the petitioner's solicitors were served with a notice for the administration order afterwards granted. The first the petitioner knew of the plaintiff's claim was by the letter she received from her solicitors advising her of the receipt of the notice. The petitioner knew nothing of the claim and was unable to instruct her solicitors in regard to it and she put in no defence.

In September, 1884, the plaintiff got the order for administration.

In proceeding under the order the petitioner filed her accounts, and the plaintiff has brought in surcharges, alleging that certain warehouse receipts held by the Dominion Bank, were invalid and that petitioner in breach of her duty allowed the bank to realize upon them: a large quantity of evidence has been taken, and the petitioner is advised the plaintiff will fail in his contention.

The Master has made no report.

In the course of the reference the Master has advertised for creditors, the only claims sent in are the plaintiff's, a small one of Taylor & Oates, and the claim of Walter Taylor upon his judgment. The Master has disallowed that of Taylor & Oates. The plaintiff's claim consists of three promissory notes said to have been made by A. M. Cannon, payable to W. P. Howland & Co., or order, for upwards of \$7,000, and interest, and to have been indorsed to the plaintiff.

The facts as to the plaintiff's acquisition of these notes I take from his examination. He says he became possessed of them in February, 1884, after the action of *Taylor v. Cannon*, an action of which he had knowledge and was present at the trial. He got the notes from W. P. Howland & Co., and was to pay a sum equal to one half he might realize out of them; he has paid nothing yet, if he gets nothing he pays nothing. When he bought them it was understood he was going to try to collect them; he bought them for that purpose. He heard these notes were in existence, and wanted Howland & Co. to join in a suit to try and see what they could do in the matter, but the Howlands did not care to do it, so he decided to buy them. The Howlands are not to have anything to do with the costs, to run no risk in regard to them—but the costs were to be deducted out of the sum recovered—if nothing recovered, the Howlands pay no costs.

The plaintiff had another claim against the Cannon estate for about \$300 (it has been disallowed by the Master), and he intended, to institute proceedings for administration before purchasing the Howland notes. He did not proceed upon his own claim for administration because he thought there might be a good deal of costs in connection with it, and these men (the Howlands) might step in and reap the benefit of his trouble, time, and costs. It was to prevent creditors standing by and reaping the benefit of his labour.

The agreement was in writing, but neither party has produced it, apparently content to rely on the examination of the plaintiff.

Proceedings upon the reference have been going on in the Master's office for a considerable time, more than a year I think, and the claim of Taylor upon his judgment of assets *quando* has been proved. The counsel for both parties expressed a wish that, if I found I could not under these circumstances set aside the administration order, I should express my opinion of the validity of the plaintiff's claim upon these notes.

As a decree for administration, at the suit of a creditor or of an executor, is for the benefit of all the creditors and one at least has established a claim under it, I do not think I can set aside the order. The petitioner has suffered these proceedings to be carried on for a long time without objection, and if the plaintiff's claim is invalid the order if promptly attacked might have been set aside. But where other creditors have acquired an interest this cannot be done.

Then is the agreement champertous or savouring of champerty?

It appears that the plaintiff and Taylor endeavored to get the Howlands to join them in a suit to have the estate administered, which they declined to do; and then tried to get the claim from the Howlands. The Howlands asked \$2,000 for the notes, which was not accepted, and they then said they would give the notes, and were to get a sum equal to one half of the net proceeds that should be realized.

I do not think this can be considered an absolute purchase. Had the proposal to take \$2,000 for the notes been accepted, that would have been an absolute purchase. But by the actual agreement the Howlands appear still to have an interest in them. The language of the plaintiff that the Howlands were to get, not the half of the sum realized, but a sum equal to half the sum, is not the language of a layman, and the attempted distinction is too thin to make a difference. The plaintiff it is true was not bound to realize. The Howlands were to incur no responsibility for costs. The proceedings, if taken, were to be in the plaintiff's name.

The arrangement is in effect this. The plaintiff thought he had discovered something that might be made available as assets of the estate. The Howlands had a large claim which they were unwilling to prosecute. They were aware of the result of Taylor's suit, which shewed that the assets were found to have been fully administered. The chance of getting in further assets depended largely, if not wholly upon establishing the invalidity of certain warehouse receipts that had been held by the Dominion Bank, and under which considerable sums had been realized by the bank. It is not surprising that the Howlands hesitated about plunging into a litigation of this kind. And so it seems did the plaintiff, for he stipulated that he should not be bound to take proceedings. And the plaintiff has as yet given nothing for the notes. He procured them to get into his hands a right of action merely. It was, in fact, an agreement for the right to sue; it was with that view the notes were transferred to him, and in the result the transferor and the transferee were to divide the proceeds. It is not of importance that the action would be taken in the plaintiff's name. In *Reynell v. Sprye*, 1 D. M. & G. 671, the deed in question did not bind Capt. Sprye to take any proceedings on the account or for the benefit of Sir Thos. Reynell, or to render him any services whatever; and it authorized Capt. Sprye, p. 673, "to commence, carry on, and prosecute any actions, suits, or other proceedings in the name of Sir Thos. Reynell, or in the name of Sir Thos. Reynell and Capt. Sprye, or otherwise, as Capt. Sprye should think proper." And Capt. Sprye undertook the ascertainment and establishment of a right of uncertain extent for Sir Thos. Reynell on the terms of the expenditure being Capt. Sprye's, and of his having the benefit of half of what should be so obtained; and it was held that such an agreement (whether it amounted strictly in point of law to champerty or maintenance so as to constitute a punishable offence or not) must be considered against the policy of the law, mischievous, and such as a Court of Equity ought to discourage and relieve against. Lord Coleridge

in *Bradlaugh v. Newdegate*, 11 Q. B. D. 1, 6, characterizes the judgment of Knight Bruce, L. J., in *Reynell v. Sprye*, as *good law in racy language*, in which he refers at p. 680, to breedbates and barrators as advising such an agreement; and at p. 686, he says if Capt. Sprye was unaware how the English laws regard the traffic of merchandising in quarrels, of huckstering in litigious discord, or was ignorant of the value of truth merely as a commodity in business, Mr. Yonge (his solicitor) should have informed him better. And in *Bradlaugh v. Newdegate*, Lord Coleridge establishes that the rules against maintenance, of which champerty is a species, are still in force. It is otherwise in many of the States of the neighbouring Union, where the English rule is not enforced, or to a large extent abrogated: 2 Pomeroy Eq. Jur. s. 936 (n)2. It is not necessary to apply the racy language of Knight Bruce, L. J., to the plaintiff, but it shews the intolerance of the English law to such transactions.

In *Hutley v. Hutley*, L. R. 8 Q. B., 112, Blackburn, J., states the agreement there in question, at p. 115. The plaintiff alleges that the defendant is heir-at-law and one of the next of kin of a deceased person who had made a will by which the personal and real estate were left away from the defendant, and in consideration that the plaintiff would take the necessary steps to contest the validity of the will, and would advance certain moneys, and obtain evidence, and instruct an attorney, the defendant promised to pay to the plaintiff one half of the personal estate, and convey to him a moiety of the real estate, which the defendant should recover. The learned Judge says, if that stood without more, it is clear that it is champerty by the English law, which says that a bargain, whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action, is illegal. And at p. 116 he notices another argument. Then the further allegation was relied on, that the plaintiff believed that the will which was to be contested revoked a former will by which the testator had bequeathed certain property to the plaintiff; and it was argued that because

the plaintiff thought he had an interest in the litigation by which the one will was to be upset and the other revived was not illegal. But the litigation was to be maintained by the plaintiff not solely, as far as he was concerned, for any benefit he might directly or indirectly derive himself from upsetting the will, but the bargain was that he would maintain the action in consideration of the defendant transferring to him half the property which the defendant might become possessed of as the fruits of the litigation. * * If every word what is said in the declaration about the plaintiff's belief in his interest in the subject matter of the writ were true, that would not justify or make legal the agreement to share in the property to be recovered by the defendant. And Lush, J., p. 117, says, that if the plaintiff had, or thought he had, a collateral interest in contesting the will, that collateral interest would not justify an agreement to share the property which the defendant should acquire by successfully contesting the will.

That case is important as shewing that though the plaintiff here might have an interest by virtue of his own claim to take proceedings for administration it would not justify him in entering into the agreement to share with the Howlands the proceeds to be recovered by means of those notes. As I have said, I do not think it material that the action was to be brought in the plaintiff's name. The substance of the agreement is, that he gets nothing and pays nothing until the proceeds are realized.

Many other cases were referred to, which it does not seem to me necessary to cite. The foregoing are sufficient in my opinion to shew that the agreement between the plaintiff and the Howlands was champertous, or at all events so strongly savouring of it, that it cannot be maintained, and that the plaintiff cannot prove for these notes in this administration suit.

As the petitioner has not succeeded in the object of her petition, I cannot give her costs, nor ought she under the circumstances, to pay costs.

[QUEEN'S BENCH DIVISION.]

REGINA v. FRENCH.

REGINA v. ROBERTSON.

Canada Temperance Act, 1878—Adjournment for more than a week—32-33 Vic. ch. 31 sec. 46 (D.)—Conviction quashed—Consent—Jurisdiction.

Where the magistrate adjourned the hearing of a case under the Canada Temperance Act, 1878, for more than a week, contrary to the 32-33 Vic. ch. 31, sec. 46 (D.), the conviction was quashed, but without costs. *Semble*, the consent of the defendant to the adjournment, if proved, would not have given jurisdiction.

Motions to quash convictions under the Canada Temperance Act, 1878.

Clement, for the motions.

Delamere, contra.

February 24, 1887. ROSE, J.—These are motions to quash convictions under the Canada Temperance Act of 1878, on the ground that the Justice of the Peace granted an adjournment for more than one week, contrary to the provisions of 32-33 Vic. ch. 31, sec. 46 (D.).

Regina v. Hall, 8 O. R. 407, was referred to, but the point in question was not there decided.

There is a decided conflict of evidence as to whether the adjournment was at the request of the defendant's counsel.

If there was such request, although it did not name the day, yet, no doubt, if the day were named by the magistrate in the presence of the defendant's counsel without objection, it would be the same as if named in the request.

In the view I have taken it is unnecessary to determine how the fact was. There is no merit in the application, and the conviction should be sustained if possible.

The words of sec. 46 are peremptory: "But no such adjournment shall be for more than one week." By sec. 47 it is provided that "if at the date fixed either or

both the parties do not appear, the case may proceed as if they were present."

It is clear that without consent an adjournment for more than a week would prevent the magistrate proceeding.

Then can the defendant by consent give jurisdiction?

The case of *The King v. Tolley*, 3 East. 467, seems to be an authority to the contrary. The head note is: "A conviction on the 4th section of the Stat. 5 Anne, ch. 14, for keeping a dog and gun to kill game without being qualified, must be made within three months after the offence committed, and if the hearing of the matter be adjourned over that time, though with the consent of the defendant, a conviction afterwards is bad."

In *Smith v. Brown*, 2 M. & W. 851, it was held that, "where an action for a tort was by consent tried before the under-sheriff, and the jury found a verdict for the plaintiff on one issue and for the defendant on another, that neither party was entitled to sign judgment, as the trial was altogether a nullity."

See also *Lawrence v. Wilcock*, 11 A. & E. 941, where in a similar case a similar judgment was given, although counsel argued that while consent did not create jurisdiction, an objection to the jurisdiction might be waived by consent.

In the *Queen v. Scotton*, 5 Q. B. (A. & E.) 493, it was held that the want of a preliminary charge on oath, under 1 & 2 W. IV., ch. 32, sec. 41, and 6 & 7 W. IV., ch. 65, sec. 9, rendered the proceedings without jurisdiction, notwithstanding that the defendant was summoned and appeared to answer to the charge, and that a witness giving false evidence at the hearing could not be convicted of perjury.

In *The Queen v. Belton*, 11 Q. B. (A. & E.) 379, it was held, under 9 Geo. IV. ch. 61, the Sessions had no power to adjourn an appeal to a subsequent Sessions. See also *In Re McCumber and Doyle*, 26 U. C. R. 516, and *The Queen v. Murray*, 27 U. C. R. 134.

No case has been cited in support of the conviction, and I do not see how I can support it without reading into the

statute the words, "except by consent of the defendant," after "no such adjournment shall be for more than one week," which would be legislation, and if I could so read the statute I would have to find how the fact was as to the consent.

The convictions must be quashed, without costs.

The usual order protecting the magistrate will go.

Convictions quashed, without costs (a.)

(a) This case was subsequently followed by O'CONNOR, J., in *Regina v. Hunter*, not reported.

[QUEEN'S BENCH DIVISION.]

REGINA V. WALKER.

Canada Temperance Act, 1878, secs. 108, 109, 111, 119—Search warrant, when proper to be issued—Certiorari, when taken away—Presumption that liquor kept for sale, when created by the finding of appliances for sale—Municipal by-law under the Act—Search warrant and conviction quashed, with costs.

An information charging defendant with having sold intoxicating liquor was laid before two Justices of the Peace, and immediately afterwards a further information to obtain a search warrant was sworn by the same complainant before the same two Justices. Thereupon a warrant to search the premises of defendant was issued under the hand and seal of one only of the two Justices. Upon the search being made three bottles were found, each containing intoxicating liquor, and it was sworn that there were also found in defendant's house other bottles, some decanters and glasses, and a bar or counter.

On the day following the search the complainant laid a new information before the same two Justices of the Peace, charging the defendant with keeping intoxicating liquor for sale. Upon the hearing the constables who executed the search warrant were the only witnesses examined, and on their evidence the defendant was convicted.

Upon motion to quash the search warrant and conviction

Held, that secs. 108 and 109 of the Act were intended to provide process in rem for the confiscation and destruction of liquor in respect of which a use prohibited by the statute was being made, and not to provide a means of obtaining evidence on which to found a prosecution or support one already begun.

Held, also, that the warrant in this case was illegal because issued by one Justice of the Peace only.

Held, also, that the operation of sec. 111 of the Act, in taking away the right to certiorari, is confined to the case of convictions made by the special officials named in the section.

Held, also, that the presumption of keeping liquor for sale created by sec. 119 of the Act arises only where the appliances for the sale of liquor, mentioned in the section, together with the liquor, are found in municipalities in which a prohibitory by-law passed under the provisions of the Canada Temperance Act is in force.

As it appeared that in this case the search warrant had been issued, and the defendant's premises searched, for the mere purpose of possibly securing evidence upon which to bring a prosecution, the Justices of the Peace and the informant were ordered to pay the defendant's costs.

The defendant was convicted on the 8th day of September, 1886, before Joseph Barker and Thomas Lawrence, two of Her Majesty's Justices of the Peace for the county of Bruce, on the information of Angus Stewart, "for that he the said Frank Walker, at the town of Kincardine, in the said county of Bruce, being a place wherein the second part of the Canada Temperance Act of 1878 then was

in force, did within three months last past, to wit, on the 2nd day of September, 1886, unlawfully contravene the said second part of the said Canada Temperance Act of 1878, by keeping for sale intoxicating liquor contrary to said Act, Angus Stewart of the township of Kinloss, in said county, a license inspector for the South Riding of said county of Bruce, being the prosecutor;" and the said Frank Walker, for his said offence, was adjudged to forfeit and pay the sum of \$50, to be paid and applied according to law, and also to pay to the said Angus Stewart the sum of \$18.50 for his costs in that behalf, and if said sums should not be paid forthwith the same were ordered to be levied by distress and sale of the goods and chattels of the said Frank Walker, and in default of sufficient distress the said Frank Walker was ordered to be imprisoned in the common gaol of the said county at Walkerton for the space of two months, unless the said sums and costs and charges of conveying the said Frank Walker to the said goal should be sooner paid.

On the 2nd day of October, 1886, the defendant obtained a writ of *certiorari* to cause the proceedings to be removed into the High Court of Justice. The magistrates returned the *certiorari* and proceedings, which were filed on the 15th day of November, 1886. In addition to the conviction above referred to the Justices returned an amended conviction, which differed from the one above set out only in making the costs \$17.01, and directing the several amounts to be levied by distress and sale of the defendant's goods and chattels, if not paid in ten days, instead of forthwith.

It also appeared that on the 16th August, 1886, Angus Stewart laid an information before the said Joseph Barker and Thomas Lawrence that he had just and reasonable cause to suspect and did suspect that intoxicating liquor, in respect to which an offence against the second part of the Canada Temperance Act, 1878, had been committed within three months last past, was concealed on the premises of Frank Walker, at the Albion hotel, in the town of Kincardine, in the said county of Bruce; also that

appliances, such as barrels, kegs, bottles, and glasses, were on said premises for the sale of liquor, and that intoxicating liquor was kept therein for the purposes of sale in violation of said Act; wherefore he prayed a search warrant might be granted him to search the premises of the said Frank Walker aforesaid for the said intoxicating liquor.

On the 16th day of August, 1886, on this information a search warrant was issued under the hand and seal of Joseph Barker alone. This warrant recited the information of Angus Stewart as follows: "Whereas, Angus Stewart hath this day made oath before me, the undersigned, one of Her Majesty's Justices of the Peace, in and for the said county of Bruce, that he hath just and reasonable cause to suspect, and doth suspect, that intoxicating liquor, in respect to which an offence against the second part of the Canada Temperance Act, 1878, hath been committed, to wit, in respect to which one Frank Walker, of the town of Kincardine, within three months last past, did unlawfully keep for sale intoxicating liquor, and the intoxicating liquor is concealed in the premises of one Frank Walker, of the town of Kincardine, in the said county of Bruce—these are, therefore, in the name of our Sovereign Lady the Queen, to authorize and require you and each and every of you, with necessary and proper assistance, to enter in the day time into the said premises of the said Frank Walker, and diligently search for the said intoxicating liquor, and if the same or any part thereof shall be found upon such search that you bring the intoxicating liquor so found, or twenty gallons thereof, if there be more than twenty gallons so found, and also all barrels, kegs, cases, boxes, packages, and other receptacles of any kind whatever containing the same, before me, to be disposed of and dealt with according to law."

On the back of this warrant was the following memorandum :

"Sept. 2, Kincardine.

"Searched defendant's place; found three bottles of whiskey; left liquor in charge of John Pratt.

PATRICK HEFFERNAN."

On the 3rd of September, 1886, Angus Stewart laid the following information before the said two Justices, Joseph Barker and Thomas Lawrence: "The information and complaint of Angus Stewart, of the township of Kinloss, in the county of Bruce, License Inspector for South Bruce, taken the third day of September, in the year of our Lord, one thousand eight hundred and eighty six, before the undersigned, two of Her Majesty's Justices of the Peace, in and for the said county of Bruce, who saith that he has reason to believe that Frank Walker, at the town of Kincardine, in the county of Bruce, did, within three months last past, keep for sale intoxicating liquor in violation of the second part of the Canada Temperance Act, 1878, then in force in the county of Bruce; and complainant further saith, that Richard Davey, James A. McPherson, Abraham J. Evans, John Sturgeon, John T. Peacock, Patrick Heffernan, John Batt, — Acheson, being now within the Dominion of Canada, are likely to give material evidence for the prosecution, and will not voluntarily appear for the purpose of being examined as witnesses at the time and place appointed for the hearing of the matter of the above information and against the above-named accused."

On this information, on 3rd September, 1886, a summons, under the hand and seal of the said Joseph Barker alone, was issued, directed to Frank Walker, of the town of Kincardine, which was as follows: "Whereas information has this day been laid before the undersigned Joseph Barker and Thomas Lawrence, two of Her Majesty's Justices of the Peace, in and for the said county of Bruce, for that you, within three months last past, at the said town of Kincardine, did unlawfully keep for sale intoxicating liquor in violation of the Canada Temperance Act of 1878, then in force in the said county of Bruce—these are therefore to command you, in Her Majesty's name, to be and appear on Wednesday the 8th day of September, 1886, at nine o'clock in the forenoon, at my office in Kincardine, before the said Thomas Lawrence and myself, or

such other Justice or Justices of the Peace of the said county of Bruce as may then be there, to answer to the said information and be further dealt with according to law.

Given under my hand and seal, this third day of September, in the year of our Lord, 1886, at Kincardine, in the county aforesaid.

JOHN BARKER, J. P." [L. S.]

On 8th September, 1886, the defendant Frank Walker appeared in accordance with the requirement of the summons, and the said Justices returned the following as the minute of their proceeding:

"Kincardine, 8th September, 1886.

Before Joseph Barker and Thomas Lawrence, two Justices of the Peace in and for the county of Bruce, appears Frank Walker, of the town of Kincardine, who is charged by Angus Stewart, one of the license inspectors of the county of Bruce, with having, at the town of Kincardine, in the said county, within three months last past preceding the 3rd day of September, 1886, unlawfully kept for sale intoxicating liquor in violation of the Canada Temperance Act, 1878, now in force in said county, as appears by an order in Council proclaimed on the 17th January, 1885, in the county of Bruce, and proved by *Canada Gazette*. The parties appear, and the defendant pleads not guilty to the defence charged.

1. Objection raised by defendant. That search warrant illegal, not being signed by more than one of the Justices before whom information was laid. Objection overruled by Bench.

2. Objection. That offence should have been proved before search warrant was issued. Overruled.

3. Objection. That the information should have specified some date within the three months. Overruled, the information having been already pleaded to.

4. Objection. That the information is untrue in stating that the witnesses named therein would not voluntarily appear.

5. Objection. That the summons issued and served on defendant is insufficient, and that the magistrates have no jurisdiction under the authority of *Regina v. Ramsay*.

Prosecution calls John Pratt,* who, being sworn, saith: 'I am a constable for the county of Bruce. I assisted in the search of defendant's premises on the 2nd September inst. One Patrick Heffernan was with me. I found three bottles containing intoxicating liquors on defendant's premises; two of the bottles contained whiskey and the other wine. The warrant now produced is the one I acted upon. Patrick Heffernan, who is a county constable, had the warrant and I assisted him. We found the liquor under the counter in defendant's bar-room. The defendant, Frank Walker, was at the time the occupant of the premises where the liquor was found by us. There was a bar in the defendant's house. There was other bottles there, some decanters and glasses. There was also a counter there. These are such as are usually found in taverns or places where spiritous liquors are sold. Patrick Heffernan read the warrant now produced. I did not. He directed me to make the search.'

On cross-examination by Mr. Loscombe:

'I don't remember that I told you the other day who signed the warrant. * * I did not see Frank Walker there, nor did I see a beer pump. I know defendant lives on the premises where we found the liquor.'

To Mr. Dixon,—'There is no other family living with the defendant, so far as I know, on the premises. The liquor now produced is part of what was found by us on defendant's premises. I took the liquor home and am keeping it subject to the order of P. Heffernan.'

Patrick Heffernan sworn, saith: 'I was engaged in the search referred to by the previous witness. We found whiskey. The endorsement on the warrant now produced, was made at the time of seizure. John Pratt was with me. Excepting a beer pump there was all the usual appliances found where intoxicating liquors are sold. Frank Walker was in occupancy of the premises at the time of seizure.'

On cross-examination he says: 'The man in charge told me that Frank Walker was the occupant of the premises, and afterwards Frank Walker, the defendant, asked me for a copy of the warrant, and said I had searched his place before he was out of bed. I think it was after I had my dinner that I gave the warrant to Mr. Barker. The endorsement on the warrant may not be correct as to the three bottles. What I tasted was whiskey. This was out of one of the bottles, and I judged the other was whiskey. I did not tell Mr. Dixon that the endorsement was correct. The endorsement was made by me, and is correct as far as my tasting whiskey out of one of the bottles. I am liable to mistakes the same as other people. In this case I made the return to the best of my knowledge and belief, having tasted whiskey in one of the bottles. I presumed the others contained the same. I delivered the liquor to Mr. Pratt. I only found three bottles. One of the three bottles may have contained wine. I don't know if I gave the warrant back to Mr. Barker, or if Pratt did. I refuse to state where I got my dinner on the 2nd September.'

Mr. Dixon here put in the Order in Council contained in the *Canada Gazette*, dated 7th February, 1885, shewing the Act of 1878 to go into force on the 1st May, 1885, in the county of Bruce.

Evidence for the prosecution rests here, and Mr. Dixon asks that defendant may be called on for his defence. Defendant refuses to be sworn. The Bench considers a *prima facie* case made out by the prosecution.

Defendant's objections to a conviction are: 1st. That liquors alleged to have been found, not produced before the Court, nor shewn that it was actually found on the premises of Walker, the defendant; that the verbal evidence and return to the warrant is conflicting. . Objections overruled.

Adjudged that the defendant is proven by the evidence adduced to have contravened the second part of the *Canada Temperance Act* of 1878, by keeping for sale intoxicating

liquor contrary to said Act within three months last past, to wit, on the 2nd day of September, 1886, at the town of Walkerton, in the county of Bruce; and we adjudge that the defendant do, for his own offence, forfeit and pay the sum of \$50 and costs, to be paid within ten days, and in default of payment same to be levied of goods and chattels of the defendant, and in default of sufficient distress we adjudge that the defendant be committed to the common gaol at Walkerton in said county of Bruce for the space of two months, unless such penalty and the costs thereof shall have been sooner paid.

J. BARKER, J. P.

THOS. LAWRENCE, J. P."

After the return of the writ of *certiorari* and the proceedings before the Justices as above, *Aylesworth*, for the defendant, on the 12th November, 1886, obtained an order *nisi* calling on the said Justices and the said informant Angus Stewart to shew cause why the said search warrant and the said conviction and amended conviction should not be quashed, with costs, to be paid by the said Justices and the said informer, or one of them, to the said Frank Walker, upon the grounds following :

(1) The said search warrant should be quashed, because no prosecution for any offence against the Canada Temperance Act, 1878, committed in respect to the liquor referred to in the said search warrant, had been brought or was depending before the Justice of the Peace, by whom the said warrant was issued, before or at the time when the said search warrant was granted.

(2) The said search warrant was granted by one Justice of the Peace only.

(3) The information on which the said search warrant was granted stated no cause for the suspicion therein sworn, nor any particulars as to the offence against the Canada Temperance Act suspected to have been committed in respect to the liquors mentioned.

The said conviction should be quashed, because (1) the summons to the defendant, served on said Frank Walker, did not name the Justice of the Peace before whom, along with Joseph Barker, the case was to be tried, and no Justice, except the one so named, had any jurisdiction under the statute to hear and determine the matter of the said information.

(2) The Justices trying the case at the close of the case for the prosecution illegally put the defendant on his defence, and, without any authority or jurisdiction so to do, required the defendant to be sworn, and in default of his rebuttal of the evidence given by the prosecution convicted him accordingly.

(3) The conviction proceeded wholly on the presumption of keeping liquor for sale supposed to be raised under section 119 of the Canada Temperance Act, 1878, but the presumption mentioned in the said section arose only where the appliances for the sale of spirituous liquor, together with such liquor were found in municipalities in which a prohibitory by-law passed under the provisions of the said Canada Temperance Act, 1878, was in force, and no such by-law was shewn to be, or was in fact, in force in the municipality in which the defendant's premises were situated.

(4) The presumption mentioned in section 119 of the Canada Temperance Act, 1878, was only for keeping for sale contrary to the provisions of the Temperance Act of 1864.

(5) In and by the said conviction the defendant was adjudged to pay an amount for costs which the said Justices of the Peace had no jurisdiction or authority to condemn him to pay, particularly certain charges for the taking of an information for search warrant, and for issuing such search warrant, and constables executing the same when such search warrant was illegally issued at a time when the prosecution for the offence charged in said conviction had not yet been commenced.

In support of the objections taken in the rule *nisi* an affidavit was made and filed, on obtaining said rule, by W. C. Loscombe, solicitor for the defendant Walker, setting forth that he appealed to Joseph Barker, one of the Justices who signed the conviction, for a statement of the costs ordered to be paid by the said Walker by the said conviction, and the said Barker, though he had mislaid the memorandum of the items made at the time of the conviction, said he believed the same was made up as stated by the said Loscombe in the said affidavit, and among the items going to make up the amount were the following: Information for search warrant 50 cents; search warrant, 50 cents; constable Pratt assisting search, \$1.50; constable Highman, search fee, \$1.50; mileage, Walkerton to Kincardine, \$2.80; mileage from Walkerton (second charge of mileage) \$2.80; Thomas Small, assisting search, 50 cents. The whole of the items amounted to \$17.01, and the magistrate informed him that in the amount stated in the first conviction there was erroneously included \$1.50, which was corrected in the amended conviction.

The Magistrate, Joseph Barker, filed an affidavit verifying an information purporting to have been laid before him Joseph Barker and Thomas Lawrence, on the 16th of August, 1886, wherein the informant Angus Stewart swore that he had reason to believe that Frank Walker did, within three months last past, to wit, between the 16th day of May and the 16th day of August, 1886, unlawfully sell intoxicating liquor in violation of the Canada Temperance Act of 1878, and after the information had been sworn to the said Stewart swore to the information to obtain the search warrant, and that after the discovery of the liquor and appliances by means of the search warrant, on or about the third day of September, the said Stewart swore to the information returned with the *certiorari*, and upon which the summons to the defendant was issued, and upon being tried he was found guilty of the offence so charged and convicted.

The said Joseph Barker did not dispute or deny the correctness of any of the statements contained in the affidavit of Mr. Loscombe.

Delamere shewed cause.

The cases cited are referred to in the judgment.

February 11, 1887. CAMERON, C. J.—Dealing with the objections to the search warrant first, the case of *Regina v. Doyle*, 12 O. R. 347, cited on the argument, shews that Chief Justice Wilson holds the opinion that the search warrant may be resorted to to sustain a charge or complaint made for an offence committed against the Act, and is not a proceeding upon which to found a charge in case liquor is found on the premises. In the report of the case, at page 353, having referred to the object of the ordinary search warrant to search for stolen property, he said: "In the case in question it may be said the search warrant was for the discovery of offenders who unlawfully keep intoxicating liquors for sale contrary to the statute, and for the obtaining of evidence against them, and that it may therefore be properly issued under section 108 of the Act which enables it to be granted. But the offence of unlawfully keeping intoxicating liquor for sale contrary to the Act is not a felony, and it does not help any person to his property as in case of stolen goods. There is not, therefore, a similarity between the warrants which are granted in in these two cases. The statute, too, applies, I think, from its language, to the case of a prosecution under the Act being actually pending, when and in the course of which the warrant issues to make the search."

I quite agree in the opinion of the learned Chief Justice that it was not in the contemplation of Parliament, as far as its intention can be gathered from the enactment, to originate a complaint upon the result of a search under a warrant issued under the Act, but I am not prepared to say that the warrant was to be resorted to in aid of the pending prosecution. I rather incline to the view advanced

by Mr. Aylesworth, on the argument, that it is a process in the nature of a proceeding *in rem* to reach the liquor by the prohibited use of which an offence against the Act has been committed ; and having regard to the facts in this case the inference seems almost irresistible that, assuming the information of the 16th August, 1886, charging the defendant with selling liquor in contravention of the Act to have been laid as sworn to by Mr. Barker, it was so laid simply to bring the proceeding within what, according to Chief Justice Wilson's opinion, might be permissible without it being then in the contemplation of the informer or the magistrate that the charge would be proceeded with if evidence should not be found by means of the search warrant on which the prosecution might be sustained ; in other words, it was in fact contrary to what Chief Justice Wilson thought permissible, a proceeding on which to found not merely to support the charge. In the administration of justice, at all events above and outside of the province of the detective, there should be no resort to experimental expedients or subterfuges. Every proceeding should be had honestly and openly and with the sole end and aim of administering the law faithfully and justly, and of bringing offenders against the law by legitimate and proper evidence within the penalties awarded for their offence.

I think, assuming Chief Justice Wilson to be right in holding that the search warrant may be resorted to in aid of a prosecution for an offence, that it cannot be obtained until the party accused has been summoned to answer such charge. The language of section 108 is : "In case a credible witness proves upon oath before the Police Magistrate or Justice of the Peace before whom any prosecution for an offence against the provisions of the Act is brought, there is reasonable cause to suspect that any intoxicating liquor in respect to which such offence has been committed, is in any dwelling-house, &c., such Police Magistrate or Justices of the Peace may grant a warrant to search

such dwelling-house, &c., for such intoxicating liquor, and if the same be there found, to bring the same before him.”

Prosecution as here used means more than the mere laying of an information. If no process issues on an information there is no prosecution. No one is pursued, no one is placed in peril. But where there is an offence charged and prosecuted, the legislature intended that the liquor by which the offence was committed to the extent of twenty gallons should be forfeited. The prosecution for an offence against the Act gives the Justices before whom the prosecution is pending jurisdiction to issue a search warrant for the sole purpose *on conviction* of the offender of forfeiting the liquor by means of which he committed the offence. I do not think it was intended to aid the prosecution in proving the offence, though I quite agree with Chief Justice Wilson that it may form a link in the chain of evidence to prove the offence, and the facts developed by the search warrant cannot be excluded, because those facts have become known through an illegal and improper proceeding. I am of opinion this warrant was illegally and improperly obtained, and must be quashed. The information on which the warrant issued was not sufficient in my opinion to give the Justices of the Peace jurisdiction to issue it. It did not disclose the facts or circumstances which went to show the just and reasonable cause the informant had to suspect that liquor, in respect of which an offence was committed, was on the defendant's premises. The information to obtain the search warrant on may be in the form of Schedule M. to the Act. This form requires the informant, in addition to stating that he has just and reasonable cause to suspect and doth suspect that intoxicating liquor, in respect to which an offence against the second part of the Canada Temperance Act of 1878 hath been committed, is concealed, &c., to state the cause of suspicion and the particulars of the offence alleged to have been committed. This, doubtless, was for the purpose of enabling the magistrate to judge of the sufficiency of the causes of suspicion to warrant what without it would be an outrage against

the sacred inviolability of a man's house by entering therein to make search. The information in the present case does not shew the causes of suspicion. It states the informant has reasonable and just cause to suspect that intoxicating liquor, &c., is concealed in the premises of Frank Walker, at the Albion hotel, and also that appliances, such as barrels, kegs, bottles, and glasses are on said premises for the sale of liquors in violation of said Act, but nothing is said about an offence having been committed. The reference to the barrels, kegs, bottles and glasses being on the premises is not stated as a reason for the informant's suspicion; and if it had been assigned as the reason for such suspicion it would not be evidence that the defendant had sold intoxicating liquor, which was the charge that had then been made before the Justices. It would, if section 119 can be made to apply, be *prima facie* evidence of keeping liquor for sale. I am also of opinion the warrant is defective in not being signed by the two Justices before whom the information was laid. The authority conferred by section 108 to grant the search warrant is an authority to the particular officials indicated in the section, and when the officials are Justices of the Peace, they are referred to as Justices, and not as a Justice. The clause, as far as necessary to shew this, is as follows: "In case a credible witness proves upon oath before the Stipendiary Magistrate, * * Justices of the Peace, or before one of the Justices of the Peace, before whom any prosecution for an offence against the second part of this Act is brought, that there is reasonable cause to suspect that any intoxicating liquor in respect to which such offence has been committed is in any dwelling house, &c., such Stipendiary Magistrate, * * Justices of the Peace, may grant a warrant to search," &c. Thus the proof of there being liquor in respect to which an offence has been committed may be made before one of the Justices before whom the charge is brought, but the warrant must be signed by more than one. The form of schedule M. is in this respect misleading. But the form cannot override the express direction of the

statute. It may be referred to to assist in its interpretation. The express authority given to one of the Justices to hear the proof and the omission of such authority in terms to him to grant the warrant, while it is expressly conferred upon Justices of the Peace, is an indication that the Legislature intended that more than one Justice of the Peace should sign the warrant. The warrant is therefore wholly void.

I must now consider the question of the validity or invalidity of the conviction.

As to the first objection, that the summons does not name the Justices of the Peace before whom, with the Justices signing the same, the case was to be heard. There were two Justices taking the information. It was these same two Justices who tried the case. The defendant appeared before them and pleaded to the charge. I think the Justices had in consequence jurisdiction to hear and adjudicate upon the case. This is at variance with the decision of Galt, J., in *Regina v. Ramsay*, 11 O. R. 210, where that learned Judge held if the magistrates had no jurisdiction appearing before them would not confer it. Thus stated the proposition is correct. But it does not apply where the Justices have jurisdiction both over the subject of investigation and the person of the accused, though the process by which the person is brought within the jurisdiction may have been irregular in itself, or irregularly executed. Here the charge against the defendant was one over which the Justices had jurisdiction, and the defendant appeared and by counsel cross-examined the witnesses for the prosecution, and I think in so doing he submitted himself to the jurisdiction. The summons issued by the Justices in this case is not open to the objection that prevailed in *Regina v. Ramsay*, as the magistrates who took the information are those named in it as the Justices before whom the defendant was required to appear and be tried, and by whom he was tried. This ground of objection to the conviction must fail.

The second, third, and fourth grounds present the same question in different form, and are substantially that the defendant was illegally put upon his defence without authority or jurisdiction, and the Justices required him to be sworn, and convicted him, upon default of his offering evidence in rebuttal, without evidence to sustain the prosecution.

The force of this objection, if I am right in the opinion I have already given, that the Justices had jurisdiction over the charge and the defendant, depends upon the determination of the question, whether there was any evidence whatever to support the charge? The information on which the conviction is founded does not show what the defendant's premises were used for, nor does the evidence taken upon the enquiry. But it appears from the information for the search warrant that the defendant's house was the Albion hotel. The evidence only discloses that on the 2nd day of September a small quantity of liquor contained in three bottles, the dimension or capacity of which is not given was found; and that there were barrels, kegs, bottles, and glasses on the premises, as the witness Heffernan put it, all the usual appliances, excepting a beer pump, found where intoxicating liquors are sold. The existence of these appliances is made by section 119 of the Act *prima facie* evidence against the occupant of the house where liquor is found, that such liquor is kept for sale. If, therefore, this section applies to the present case, there is evidence clearly sufficient to warrant the conviction, and if it does not apply then there is no evidence and the conviction ought not to be sustained. Mr. Aylesworth contended that it did not apply, as it was not only not shewn that a prohibitory by-law had been passed under the Temperance Act of 1864, but as far as the municipality of the town of Kincardine in which the defendant resides, and has his house in which the liquor was found, is concerned, it appears in the affidavits filed there was no such by-law passed under that Act or the Act of 1878.

Under the Act of 1864 there was power given to municipalities to pass prohibitory by-laws. Under the Act of 1878 there is no express power given to pass such a by-law. Under the Municipal Institutions Act, 1883, by section 482, sub-section 23, municipalities are empowered to pass by-laws for prohibiting the sale of intoxicating liquors and the issue of licenses therefor according to the provisions and limitations contained in the Temperance Act of 1864, The Canada Temperance Act 1878, and the Temperance Act of Ontario. I am not aware that in any of the numerous cases the Canada Temperance Act has given rise to this question has ever come up. Section 119 in express terms confines the operation of the clause to municipalities wherein such a by-law is in force; and as there is no by-law in force in the municipality of Kincardine wherein the defendant resides, and the appliances, whether discovered under legal or illegal process, can only have the effect they would produce at common law as evidence; and to my mind without more appearing than was shewn here, the existence of these appliances establishes no case to warrant the calling upon the defendant for his defence. Sec. 121 of the Act only extends to prosecutions for the sale, barter, or other unlawful disposal of intoxicating liquor. It does not, therefore, justify the Justices where the charge is as in this case, for the offence of keeping for sale, and not for selling, bartering, or other disposal of liquor, calling upon the defendant to give rebutting testimony. I am therefore of opinion that the conviction must be quashed, if I have a right to review the decision of the Justices on *certiorari*, and the Court has such right unless the right to a *certiorari* is expressly taken away by the terms of the 111th section of the Act. The operation of the section is, I think, confined to convictions made by the special officials therein designated, and does not apply to convictions by two or more ordinary Justices of the Peace. Of course, if there is any evidence for the consideration of the Justices at all of the guilt of the party accused, the weight of such

evidence is wholly for the Justices, and their decision cannot be reviewed by the Court. I base my opinion against the validity of the conviction solely upon the ground that there is a total want of any evidence that indicates the defendant kept liquor for the purpose of sale or barter or other disposal thereof. If there is, then if I resided in a county where the Temperance Act is in force, I might be convicted of the offence, for there is in my house at times liquor for medicinal or culinary purposes, barrels, kegs, bottles, and glasses, all the appliances that were found on the premises of the defendant, with the exception of a counter, and I might be convicted, unless I chose to enter upon my defence and rebut the inference that the Justices chose to draw of my guilt from the presence of these appliances. By the law of England, which prevails in this Province, no man can be found guilty of an offence without proof by credible witnesses, on oath, directly establishing the charge or establishing a chain of circumstances that lead irresistibly to the conclusion of guilt. The accused is at liberty to say, I do not choose to say anything except that I am not guilty. I entertain a very strong opinion that the search warrant was issued in this case not for the purpose of securing liquor in respect to which an offence had been committed for the purpose of having such liquor forfeited and destroyed, but for the purpose for which it was applied, of enabling the informant to use the finding of the liquor as evidence against the defendant of such an offence against the Act as the facts elicited by the search might disclose had been committed. This is demonstrated by the charge of keeping liquor for sale being formulated on the 3rd of September, the day after the search, and which was not the charge that had been preferred against the defendant on the 16th August, but for which the defendant was not summoned, nor were any proceedings had or taken thereon. I think, therefore, it is but right that the Justices of the Peace should be made to pay the defendant's

costs. The rule will therefore be absolute to quash both the search warrant and the conviction, with costs to be paid by the Justices and the informant.

Order nisi absolute, with costs.

[QUEEN'S BENCH DIVISION].

SIMPSON V. THE CORPORATION OF THE VILLAGE OF
HUNTSVILLE.

Municipal corporation—Negligence—Accident occurring prior to organization of municipality—49 Vic. ch. 55 (O.)—Non-liability—Pleading.

To an action by plaintiff against defendants for an accident to plaintiff on 11th April, 1886, caused by slipping on a sidewalk of defendants "covered with snow and ice, negligently allowed to accumulate thereon by defendants, and being otherwise defective and negligently out of repair for a long time to the defendant's knowledge, and which it was their duty to keep in repair," defendants pleaded that the village had not at the date of the accident been organized according to the terms of 49 Vic. ch. 55, incorporating said village, and could not have any officers or servants, and could not be and was not guilty of negligence, and by reason of anything done or omitted previous to or at the said date of said alleged accident.

Held, on demurrer, a good defence.

STATEMENT of Claim :

1. Alexander Simpson, the above-named plaintiff, is a carpenter, formerly living in the village of Huntsville, in the district of Muskoka, but now of Sundridge, in the district of Parry Sound.

2. The plaintiff, on or about the 11th April, 1886, at and within the corporation of the defendants, was walking upon and along a sidewalk, the property of defendants.

3. The sidewalk being covered with snow and ice, negligently allowed to accumulate thereon by defendants, and being also defective and negligently out of repair for a long time, to the knowledge of the defendants, which it was their

duty to keep in repair, plaintiff, whilst walking thereon, slipped and fell so violently that his arm was fractured, and other serious injuries were sustained by him.

4. In consequence of the fracture of his arm and other injuries caused as aforesaid the said plaintiff has been prevented for many weeks from engaging in his usual occupation, and suffered great bodily agony, and has been put to great expense for the services of a surgeon in setting said fracture and for attendance.

Statement of defence :

5. The defendants further say that the village of Huntsville had not at the date of the said alleged accident been organized according to the terms of the Act, 49 Vic. ch. 55. (O.) incorporating the said village, and could not have been organized pursuant to the terms of the said Act before the said date, and said defendants had not at that date and could not have any officers or servants, and could not be guilty, and were not guilty of negligence by reason of anything done or omitted previous to or at the said date of the said alleged accident.

Demurrer :

1. The defence does not deny the incorporation of the village of Huntsville, and it is no defence to say that the said village could not have organized and could not have any officers or servants.

2. A municipal corporation has always in contemplation of law officers and servants.

3. The Statute of the Province of Ontario, 46 Vic., ch. 18, sec. 60, provides for the officers and servants of a municipal corporation between the period of its incorporation and the period of its complete and separate organization.

John A. Paterson for the demurrer.

Arnoldi, contra.

March 4, 1887. ROSE, J.—The point for decision on the argument before me was whether the defendant corpor-

ation could in law be made liable for damages caused by an accident on the 11th of April, 1886.

The accident, as alleged, happened by the plaintiff falling on a sidewalk, "the sidewalk being covered with snow and ice, negligently allowed to accumulate thereon by the defendants, and being also defective and negligently out of repair for a long time to the knowledge of the defendants, and which it was their duty to keep in repair."

The Act of Incorporation was assented to on the 25th of March, 1886, and contained provisions for appointing a council.

By sec. 7, except as otherwise provided by the Act, the provisions of the Consolidated Municipal Act, 1883, and of all other general Acts respecting municipal institutions, with regard to matters consequent on the formation of new corporations, were made to apply to the village as if it had been incorporated under the provisions of the Municipal Act. Thereby sec. 60 of the Act of 1883 was made to apply.

By its terms the council of the township of Chaffey, from which the village was separated, and the members of such council having authority in the locality or municipality immediately previous to the incorporation, continued to have the same powers as before until the council for the village was organized, and all other officers and servants of the village were continued in their respective offices, with the same powers, duties and liabilities as before, until dismissed, or their successors were appointed.

The new council was not organized until after the accident.

It seems very clear, therefore, that up to that time the duty of keeping the walks in repair and free from obstruction was on the municipal council and its officers and servants, and if there was neglect the neglect was of such council and not of the defendant corporation.

As suggested by Mr. Arnoldi, how would notice to the defendant corporation of default be shewn? Who was officially in existence that should have observed the condition of affairs?

Mr. Paterson frankly admitted that if he had desired to notify anyone of the condition of the sidewalk, say on the 26th of March, or the 10th of April, he would have notified the township council and its officers or servants; but argued that the result of the Act, ch. 55, 49 Vic., read with sec. 60, was to make the officers of the municipal council officers of the defendant corporation.

That argument would make the township council, pending the organization of the village council, the municipal council of the village, as a municipality distinct and apart from the township, which of course would not be argued.

I think the record shews no liability on the part of the defendant corporation, and the demurrer must be overruled, with costs.

Judgment for defendants on demurrer, with costs.

[COMMON PLEAS DIVISION.]

LEGGATT V. CLARRY.

Sale of goods—Bills of exchange given for price—Recovery on—Total failure of consideration—Counterclaim—Evidence of damages.

The defendant ordered a quantity of boots from plaintiff at Montreal, through G., plaintiff's agent, who shewed defendant samples, some being known in the trade as "solid leather," and others as "shoddy." The defendant said he bought what was represented as solid leather, while G. said he sold by sample, and that the boots were in accordance therewith. The order was given in September, and parts delivered respectively in October and November, and the balance somewhat later. The defendant said he complained, in October, and again some three weeks later, to G. of the quality of the boots, and that he would ship them back, when G. told him to do so. The defendant said he shewed G. a pair of the boots which had turned out badly, and G. said as he was going to Montreal he would shew them to the plaintiff. On G.'s return he told defendant that if there were any more like that to send them all back. In January the defendant went to Montreal and asked for an extension of time for payment, to see if the goods turned out all right, which the plaintiff refused to give, when defendant said if they did not turn out right he would return them. The boots were taken into stock and a large quantity sold; but a few pairs were returned. In February the defendant claimed to be entitled to return the boots as not answering the contract. There was no evidence to shew what defendant's loss was; and the whole evidence was conflicting. It was urged that the defect was a latent one, and therefore not discoverable by ordinary inspection and examination. The defendant accepted four bills of exchange in payment of the price, one of which he paid after maturity. In an action on the other three the defendant denied his liability thereon; and also counterclaimed for damages. The learned Judge at the trial found for the plaintiff on the bills, and dismissed the counterclaim, without prejudice to the defendant bringing a fresh action for damages.

Held, that the finding as to the bills was correct, as there was unquestionably a good consideration therefor; and defendant's remedy, if any, must be on his counterclaim; but, in the absence of any evidence of loss, there could be no judgment thereon; and also, if the Judge at the trial had decided on the conflicting evidence, the Court might not be able to interfere. The right, however, conceded, of bringing a fresh action, placed the defendant in as favourable a position as he could expect.

THIS was an action upon three bills of exchange drawn by the plaintiff on and accepted by the defendant on account of the price of certain boots and shoes bought by the defendant from the plaintiff.

The defendant, in his statement of defence, alleged that the contract for the boots and shoes was made by the defendant with one P. M. Goff, the agent of the plaintiff,

who at the time produced samples thereof; and it was expressly agreed with him that the said boots and shoes should be solid leather and not shoddy. Some time after the the goods had been delivered at the defendant's store in the village of Columbus, the defendant discovered that the said boots and shoes were not according to the contract, and were not solid leather, but shoddy, and the parties to whom the defendant sold some of them returned the same, and the defendant thereupon represented the facts to the said Goff who upon seeing a sample of the goods admitted to the defendant that they were not the class of goods that he had contracted for, and he directed the defendant to return the said goods to the plaintiff which the defendant accordingly did: that the amount of the goods delivered to the defendant was the sum of \$690 and the defendant paid on account, before discovering the quality of the said goods, \$185.55, and returned to the plaintiff by direction of the agent Goff as aforesaid, goods to the value of \$484.12. And by way of counterclaim the defendant claimed damages from the plaintiff for such breach of contract, the defendant having been obliged to purchase other goods at an increased price to supply his customers at his said store. He had also lost the profit he would have made on the sale of such goods; and in other respects his said business had suffered by reason of the said breach of contract of the plaintiff.

The plaintiff in reply denied all the allegations in the statement of defence and counterclaim, and alleged that the goods were accepted by the defendant as being in compliance with the contract after he had the opportunity of examining the same and accepted bills of exchange for the price of the goods, one of which after the maturity thereof he paid, and the others were those sued on.

The case was tried before Armour, J., and a jury, at Cornwall at the Fall Assizes of 1886.

By the evidence it appeared that the goods were ordered by the defendant through one Goff as the agent of the plaintiff, who shewed the defendant samples of the goods,

some of which were what is known in the trade as solid leather, and the others as shoddy. The defendant swore he bought what was represented as solid leather; and the agent Goff swore that he sold according to sample.

There was conflicting evidence as to whether some of the goods delivered were solid leather or not; but some were unquestionably shoddy.

The order for the goods was given about the 5th September, 1885, and part of the goods were sent to defendant in the beginning of October to Toronto, and he refused to receive them as they should have been sent to him at Myrtle. They were afterwards properly delivered. The defendant took them in stock, and sold some to customers. Another portion of the goods was delivered in the latter end of November, 1885, and the balance sometime later. In January the defendant went to Montreal and wished to get an extension of time, as he said, to see if the goods would turn out all right. The plaintiff refused to renew the note, and then the defendant said to him: "If you cannot do that, I will tell you what I want. I want to see if the goods are going to turn out all right, and if they don't I am going to ship them all back." The defendant said the goods were taken into stock at once and sold nicely at first, and looked well, but did not turn out well. Shortly after the boots and shoes were received the defendant gave a pair to his servant girl, who wore them three or four days and the sole came off. This was about the 16th or 17th October. He met the agent Goff and took him into his house and shewed him the boots. Goff said "that is not the kind of boot I ordered. You had better send them back if they are going to turn out like that." The defendant said he was going to do so; and Goff said, "I will dictate a letter for you to send." This letter was written but not sent, as Goff said, "I am going to Montreal to-morrow, and will take that boot with me and shew it to Leggatt." When Goff came back, according to the evidence of defendant, he told him if there were any more boots like that they could all be sent back. The defendant went on selling the

boots ; and, according to the evidence of a clerk of the defendant, probably more than six pairs of the shoes were returned. He could not tell how many pairs had been sold ; he would not say 200 pairs.

The evidence did not disclose, assuming the boots and shoes not to be in accordance with the contract, what the defendant's loss was.

The learned Judge gave judgment in favour of the plaintiff for the amount of the bills of exchange ; and dismissed the counter-claim, without prejudice to any fresh action the defendant might bring.

In Michaelmas sittings, *S. M. Jarvis* moved on notice to set aside the judgment for the plaintiff, and to enter the judgment for the defendant.

During the same sittings, November 27, 1886, *McCarthy*, Q. C., and *S. M. Jarvis*, supported the motion. There can be no recovery on the notes. There was a total failure of consideration. The goods for which the notes were given were sold with a warranty that they were solid leather, and it was proved that they were shoddy, and wholly unfit for the purpose sold, and therefore the defendant had the right to reject them. The time for rejection was extended by Goff, or perhaps more correctly speaking, he induced the defendant to put off rejection. There was clear evidence to shew Goff's authority. The defect was a latent one, and there was the right of rejection as soon as the defect was discovered. In any event the defendant was entitled to damages on the counterclaim. They referred to *Heilbutt v. Hickson*, L. R. 7 C. P. 438 ; *Rickard v. Moore*, 38 L. T. N. S. 841 ; *Curtis v. Pugh*, 10 Q. B. 111, 115 ; *Bushel v. Wheeler*, 15 Q. B. 442 ; *Chapman v. Morton*, 11 M. & W. 534 ; *Poulton v. Lattimore*, 9 B. & C. 259 ; *Bannerman v. White*, 10 C. B. N. S. 844.

Aylesworth, contra. This was a sale by sample and not with a warranty. Both the plaintiff and Goff shew this. If there was a sale by warranty, the warranty was complied with. The boots were what was known as solid

leather in the trade. Goff had no authority to extend the time for rejection. His authority was limited to a sale. But as a matter of fact he never did extend the time, or induce defendant to put off rejection. The defendant must shew that he had the right to rescind the contract and reject the goods. He clearly had no right to do so. There was the long continued delay in complaining about the goods, and it was only after the plaintiff had refused to extend the time for payment of the bill of exchange, and after suit that the defendant claimed the right to reject. The goods were accepted and payment made by the defendant. There was no total failure of consideration to constitute a defence to the bill of exchange. Even if it was proved that the goods were not according to contract, the plaintiff's only remedy would be by cross-action or counter-claim for damages; and there was no evidence to shew what the plaintiff's damages were: *Kibble v. Gough*, 38 L. T. N. S. 204; *Rickard v. Moore*, 38 L. T. N. S. 841; *Page v. Morgan*, 15 Q. B. D. 228; *Morton v. Tibbett*, 15 Q. B. 428; *Dymont v. Thompson*, 9 O. R. 566; *McClure v. Kreutezeger*, 6 O. R. 480.

McCarthy, Q. C., in reply. Even assuming that the goods were sold by sample, as contended for by the defendant, they were represented by sample to be solid leather, and the evidence wholly fails to prove this. The defendant therefore either bought solid leather boots, or if by sample, then there was a misrepresentation, and this entitled the defendant to reject. He referred to *Benjamin on Sales*, 4th Am. ed., p. 916, sec. 1051; *Mody v. Gregson*, L. R. 4 Ex. 49.

December 24, 1886. CAMERON, C. J.—It appears to me that the learned Judge could not upon the plaintiff's case have come to any other conclusion than he did. There was unquestionably a good consideration for the acceptance of the bills of exchange; and the fact that some of the goods purchased did not answer the contract, the price of the whole constituting the consideration, there was no failure

of consideration that could be defined and made applicable to any one or all of the bills; and therefore the defendant's remedy for the alleged breach of contract in not supplying goods of the quality ordered must rest on the counterclaim.

Mr. McCarthy contended that on the facts the case came within the *ratio decidendi* of *Heilbutt v. Hickson*, L. R. 7 C. P. 438, the French Army shoe case, and the defendant was at liberty to reject the goods, as the defect in the boots and shoes was latent, and could not be discovered by ordinary inspection or examination. But a perusal of the language of Chief Justice Bovill in stating the law will clearly demonstrate the defendant here had no right of rejection of the goods in February when he assumed to do so; and that his only remedy is, if the goods are not according to the contract, by cross-action or counter-claim.

At page 450 the learned Chief Justice said: "In the judgment of the Court of Exchequer Chamber delivered by my brother Williams in the case of *Behn v. Burness*, 3 B. & S. at p. 376, the law is thus laid down: 'In cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed: still, if he receive the thing sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for the breach of which he may bring an action to recover damages.' And in the last edition (1871) of the notes to *Williams' Saunders*, vol. i., p. 554, the result of the cases is thus stated by the learned editor. 'When it appears that the consideration has been executed in part, that which was before a warranty or condition precedent, loses the character of a condition, or, to speak more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz. a stipulation by way of agreement, for the breach of which a compensation must be sought in damages.'"

The learned Chief Justice proceeds, page 451: "In cases of executory contracts, where there is a warranty of quality, the purchaser is not only not bound to receive the good^s unless they correspond with the warranty, but, even after they have been delivered by the vendor, may reject them on discovering the defect. It is, however, generally necessary, in order to enable the purchaser to recover back the price which he may have paid for the goods, that he should not have done more than was necessary for a fair trial of them, or for the purpose of examination and comparison, and also that he should reject the goods within a reasonable time, and that he should not have done any act to alter the position of the vendor, nor, as said by Parke, J., in *Street v. Blay*, 2 B. & Ad. 456, at p. 458, to delay the return of the goods. If the purchaser has exercised acts of dominion over the goods, as by parting with the property in them, or has prevented the vendor being placed in the same situation, then, generally speaking, he will not be entitled to return or reject them. And see also *Hunt v. Silk*, 5 East. 449, at p. 452; *Clarke v. Dickson*, E. B. & E. 148; *Street v. Blay*, 2 B. & Ad. 457, especially the observations of Crompton, J., and the conclusion of the judgment in *Blackburn v. Smith*, 2 Ex. 783, at p. 792

In some cases, however, such as where the goods are utterly valueless, the dealing with them by the purchaser has been held not to affect his right to reject and to refuse to pay anything for them; as in *Poulton v. Lattimore*, 9 B. & C. 259, where the purchaser had sown some and sold other part of certain clover seed which had been warranted as new growing seed, but the whole of which turned out to be totally unproductive and useless.

In determining what is a reasonable time for rejecting goods, the conduct of the seller may be taken into consideration; as, where by a subsequent misrepresentation he has induced the purchaser to prolong the trial: *Adam v. Richards*, 2 H. Bl. 573. And where a purchaser is entitled to reject goods, and gives notice to the vendor that he has done so, the latter is bound to take them away; and, if he omits to do so they remain at his risk, as was

laid down by Bayley, J., in *Okell v. Smith*, 1 Stark. 107, at p. 109."

The observations which immediately follow are pertinent to the circumstances of the case. "If the case had rested on the original contract, we should have thought as to the 12,225 pairs of shoes sent to France, that by the appropriation of these shoes by the defendants for the plaintiffs, the inspection and examination of them by the plaintiffs' agents, their being passed by those agents, the making out of invoices of the shoes so passed, debiting the plaintiffs for them as bought by the plaintiffs from the defendants, the delivery of them at the wharf, and the defendants having no further control over them, the plaintiffs paying the defendants the amount of the invoices and subsequently sending the goods as their own to France and causing the freight and duty to be paid on them, and tendering them to the French authorities under the contract of M. Potal—they must be taken to have accepted their shoes, that the property in them vested in the plaintiffs, and that they were not at liberty to reject the shoes and throw them back on the defendants' hands; see in addition to the cases cited, and those above referred to, *Rohode v. Thwaites*, 6 B. & C. 388, and *Parker v. Palmer*, 4 B. & A. 387. * * *

In this view of the case, the shoes delivered would have remained the property of the plaintiffs and at their risk, though they would still have been entitled to claim damages by reason of the breach of warranty, and not be precluded by their acceptance of the goods, or the vesting of the property in them, from maintaining this action. The damages, however, in that case would not have included the whole price paid for the shoes, but only the difference in value between those which were delivered and what would have been their value if they had been supplied according to the contract, with such other amounts as the plaintiff could legally establish."

The plaintiffs in that case recovered judgment for the whole price paid and some additional damages; but their right to so recover was based on what the jury found was

a subsequent contract to the original contract of sale. By the subsequent contract the defendants agreed to take back the shoes that might be thrown on the plaintiffs' hands in consequence of paper being found in them. The shoes were rejected by the French authorities, and thrown back on the plaintiffs' hands.

What took place in the present case, assuming the plaintiff's version of it to be true, and that Goff the agent had power to bind the present plaintiff by what he said, would fall short of enabling the defendant to return the goods he had remaining on hand on the 7th of February, when he sent them by rail addressed to the plaintiff at Montreal, and which he refused to accept. The interview with Goff was in October, and probably November also.

The defendant swore, (page 3 of the reporter's notes,) " I had a further conversation with Goff in regard to these goods. He came in to get a draft cashed on a firm in Montreal. I said to him, 'What in the name of common sense did you send such boots for? They are turning out most ridiculous. If they keep on like that I am going to send them back. He said to send them back, and it would teach them a lesson not to send such truck as that to a party he sold to. Two or three weeks after I saw him in the hotel, in the American Hotel, I think, and I told him the boots were getting worse and worse every day, and I said, 'I am going to ship them back.' He said, 'That is right; ship them back.'" This must have been a month before the defendant was in Montreal trying to get an extension of time to pay his bill of exchange, then maturing, and he did not ship the goods back till the 7th February. Of course if he had the right to reject he was not bound to ship back. He could allow the goods to remain in his own store at the plaintiff's risk. The property had clearly passed to him. He had exercised dominion over it. He had sold a considerable portion of it, and of the portion sold only a few pairs were returned upon his hands. He was, therefore, clearly not in a position to restore the goods as he received them, and could not put the plaintiff in

the position as to the goods that he was in at the time of delivery. If the money had been paid he could not have recovered it back. He is in no better position with regard to a defence on the bills of exchange. The evidence was not sufficiently distinct and specific on his behalf to shew the extent of his damages to warrant the learned Judge in finding any substantial damages on the counter-claim in his favour. But there was some evidence that showed some of the shoes were shoddy; and, though sold by sample, if it was represented that the samples were solid leather, I think as matter of law the defendant was entitled to have solid leather shoes, answering in appearance as to style and make the sample shewn. But there was also conflicting evidence, and the learned Judge may have decided on such conflict of evidence; and, if so, this Court might not be able to differ from him in the conclusion he has arrived at. The right conceded to the defendant of bringing a fresh action in respect of his counter claim has placed him in as favourable a position as under the circumstances he could reasonably expect.

On the last day of Term the plaintiff filed an affidavit shewing that the goods the defendant returned in February 1886, he had again resumed control over by afterwards ordering them to be sent by the railway company in October 1886, to the defendant's address at Toronto. To this the defendant has replied by affidavit, that they were brought again to Toronto for the purpose of having them examined by an expert in preparing for the trial; and he acted thereon under the advice of counsel and made no use of the goods except to obtain samples for the trial.

In the conclusion I have come to I have been wholly unaffected and uninfluenced by the affidavits.

The result is, the defendant's motion must be dismissed, with costs.

GALT and ROSE, JJ., concurred.

Motion dismissed, with costs.

[COMMON PLEAS DIVISION.]

JAMES ET AL. V. CLEMENT.

*Party wall—Evidence—User—Agreement—Landlord and tenant—Jury—
Divisional Court entering judgment.*

The plaintiffs claimed that the wall between theirs and the defendant's buildings was a party wall: that defendant had, without plaintiffs' consent, raised it a foot above the plaintiffs' premises, and altered the roof from a flat to a slanting one, whereby water was discharged on the plaintiffs' premises and injured them, for which they claimed damages; and also asked for a declaration that the wall was a party wall: that defendant should be restrained from preventing plaintiffs from using the wall, together with the new part, on payment by plaintiffs of half the cost thereof, and also from allowing the water to be discharged on plaintiffs' premises. The wall was proved to be wholly on the defendant's land. The part constituting the cellar foundation projected some seven inches, upon which the plaintiffs' had rested the joists of their building in the cellar, the joists of the upper floors being let into the wall. The jury found that the wall was a party wall, and that the plaintiffs' had sustained \$35 damages. Judgment was entered for the plaintiffs, and a decree made as asked.

Held, on motion to the Divisional Court, that the wall was not a party wall, nor was there any evidence from which a grant of, or the right to use a part thereof, could be presumed: that it was misdirection in the learned Judge to tell the jury that the user of the said wall for the said purposes for over twenty years constituted it a party wall, for at most it would merely give an easement for such purposes. This, however, was not in question, as plaintiffs' claim was not to continue such use, but to extend it: and that there was also misdirection in stating that the defendant would be bound by any arrangement made between the plaintiffs' predecessors in title and the tenant of the defendant's predecessors in title under a twenty years building lease, and whereby the lessor, at the expiration of the term, took the buildings at valuation, for there was nothing to shew that the defendant's predecessors were parties to the arrangement.

Held, also, that this being a case which before the O. J. Act would have been in the sole jurisdiction of the Court of Chancery to grant the relief asked, the Divisional Court could act without the intervention of a second jury; and, the evidence failing to establish the plaintiff's right to the relief asked for, the decree was set aside; but as to the damages, as they had not been moved against, they were not interfered with.

THIS was an action tried before O'Connor, J., and a jury, at the last Brantford Assizes.

The plaintiffs in their statement of claim alleged that they were the owners of, or well entitled to, a store or tenement on the west side of lot No. 19 on the north side of Colborne street in the city of Brantford, known as Agnew's boot and shoe store, and of the land upon which the same

was situate : that the defendant had been and then was the owner of the store or tenement on the east side of said lot known as Fowler's fruit store : that the foundation of the dividing or partition wall between the plaintiffs' and defendant's is the plaintiffs', and was on the plaintiffs' premises, and the upper part has always been and was then a party wall : that the defendant in or about the year 1875, without the license or consent of the plaintiffs, continued the said party wall about a foot above the plaintiffs' premises, and altered the state and condition of his roof from a flat gravelled roof, two feet below the top of the party wall, to a shingle roof with a pitch of about fifteen feet slanting towards and overhanging the plaintiffs' premises, and thereby raised the said roof of the defendant above the plaintiffs' roof with the rafters or joints sloping down to and resting on the said party wall. By reason of such alteration the snow and ice in winter and the water in summer, which fell on the defendant's said roof, were discharged in larger quantities upon the plaintiffs' building and premises, thereby occasioning great injury and loss to the plaintiffs. And they claimed (1) a declaration of the Court that the said original wall was a party wall; (2) in default of the defendant agreeing to allow the plaintiffs to use the continuation of the said wall as a party wall upon paying their proportion of the cost of the erection thereof, an injunction to compel the defendant to remove that portion of said wall from off the plaintiffs' premises, and resting on the said wall, to its original condition; (3) an injunction to restrain the defendant from permitting water, snow and ice to be discharged from the roof of the defendant's building upon the plaintiffs' premises; (4) to be paid their costs of suit; (5) and such further and other relief as the nature of the case might require.

The defendant, by his statement of defence, denied the plaintiffs' allegations; and alleged that the foundation and wall were the defendant's, and the said wall was not a party wall.

By the evidence it appeared that the plaintiffs' and defendant's predecessors in title held both properties in common, and by deed of partition, bearing date the 7th December, 1849, the predecessor in title of the defendant became entitled in severalty to the east forty feet of the said lot, and the predecessor in title of the plaintiffs to that portion of the lot lying west of the said forty feet of the defendant. At the time of the partition there were wooden buildings covering the land, the land of the defendant being occupied by his father, Joseph D. Clement, as a tavern, supposed to be forty feet in front on Colborne street, and coming up to the store of John Lovejoy, the father of the female plaintiff. These buildings were afterwards burned down, and the said Joseph D. Clement, in April, 1853, leased twenty-four feet next to Market street to Messrs. Cartan & Dee, and sixteen feet adjoining the plaintiffs' land to one Samuel Morphy for twenty years.

There was a stone foundation under the wooden building of Lovejoy.

By the terms of these leases Joseph D. Clement was to have the right of buying the buildings erected by his tenants at the end of the term by paying two-thirds of the value of the walls. Carton and Dee and Morphy put up brick buildings.

There was conflicting evidence as to whether Morphy used the original foundation, or built a new foundation wall; but, whichever way that may have been, according to the evidence of the surveyor called by the plaintiffs, and the surveyor called by the defendants, the west face of the defendant's wall was within the forty feet owned by the defendant; and this wall was built sometime before there was a building put up on the plaintiffs' land. The foundation or cellar wall projected west of the defendant's wall about seven inches, and the joists of the plaintiffs' building in the cellar rested on this ledge. The joists of the floors above were let into the defendant's wall, the defendant's premises being then in the occupation of the lessee Morphy.

In 1860 the buildings were again burned down, and Morphy built again on the same foundation.

In May, 1860, John Lovejoy having died in 1858, a deed of partition was made and executed by and between his heirs.

By this deed the female plaintiff became entitled to the land adjoining the defendant by the following description: "a part of town lots seventeen, eighteen, and nineteen, commencing at a certain point on the north side of Colborne street, and west side of Market street, at the distance of forty feet west of the south-east angle of lot No. 19 on the north side of Colborne street," and giving metes and bounds including the land of the plaintiffs in respect of which this action was brought.

There was conflicting evidence of the nature of the damage done to the plaintiffs' premises by the alleged wrongful flow of water from the defendant's premises; but it is not necessary to refer thereto as the finding of damages by the jury in favor of the plaintiffs to the amount of \$35 was not moved against.

The learned Judge's charge, as far as material, was as follows: "If you are of opinion in the first place there was an agreement—and you may come to that conclusion if you think proper because of the long user it may be presumed—that there was a binding agreement between the parties. If they continued to stand in the way for twenty years or more without any dispute with regard to it, it may be presumed, and the law generally directs that it is to be presumed, that there was an agreement at the foundation.

And then again, although it is objected that if there was such an agreement it was on the part of the lessee whose term was for twenty years only, and he could only make a binding bargain during that time.

I am not disposed to agree with the learned counsel in that respect, because in the first place his landlord was there, and he saw or may be presumed to have seen what was done. His agreement with his tenant was at the

conclusion of the lease he would take the improvements : that the value should be ascertained ; and that he would pay two-thirds of the value. He said himself of the original cost when he was in the box ; but I thought afterwards it was rather shifted from that to the value at the conclusion or determination of the lease.

It appears, although not directly proven, it is admitted by the defence, and partly drawn out of Mr. Ford, that there was an arbitration, and that there was a settlement on those terms. I think that as a matter of law that implies, where no objection was made, that, whatever arrangement was made with regard to the party wall, that when the landlord took that from the tenant under these terms, that he accepted it under whatever arrangement he had made with the adjoining party. It seems to me that is the only reasonable way in which it can be looked at ; and I am strongly disposed to think that is the legal effect of the whole. Having told you that, you will accept that from me, and you need not trouble yourselves on that point. I take the responsibility of telling you I think, if he made an arrangement with the adjoining party in that way it is binding ; and you may, I think, infer the arrangement from the long user without objection having been made. Then if that is the case you are to determine upon the evidence upon which side of the line that party wall was built up."

Mr. Robertson, Q. C., for the defendant, objected to this direction : " The wall in question was built on and is on the defendant. The fact of the wall being on our land is not a disputed point. I submit that you should tell the jury, that if they find that the wall is on the defendant's land that there was nothing shewn to make it a party wall."

The learned Judge—" I will not tell them that, because I have told them to the contrary. I have told them they may presume from the long user, that there was an agreement, and that the defendant, or Mr. Ford, was bound by that."

Mr. Robertson—"What I was going to say—your Lordship should tell the jury if they believe the evidence of the surveyors, Jones and Fair, and [there being nothing to the contrary, the wall was built and is on the defendant's land, and there is no evidence offered to shew that there was any agreement to make this a party wall, and that it was consequently not a party wall; in that case they should find for the defendant. I object to your Lordship telling the jury that there has been any such user of the wall shewn as entitled the plaintiffs to claim it as a party wall."

The jury found that the wall erected by Morphy was a party wall. And the learned Judge made, in addition to directing judgment to be entered for the plaintiffs for \$35 damages, the following decree or order: "I also declare the said wall in the pleadings mentioned is a party wall as between the plaintiffs and defendant, and their said buildings; and I order that the defendant, his workman, servants and agents be, and are hereby restrained from preventing the use of the same by the plaintiffs, including the new part or continuation thereof upon payment by the plaintiffs of one-half the cost of the erection of such continuation or new part; and that the defendant, his workman, servants and agents be and are hereby restrained from permitting or allowing the water to drip or run from his said building, the roof, or eave-trough thereof, upon the said wall or any part thereof, and from permitting or allowing the discharge of water, snow or ice from the defendant's roof upon the said wall, or upon the plaintiff's adjoining roof; and I further order that the defendant shall pay to the plaintiffs full costs of this suit up to judgment."

The learned Judge further directed that it should be referred to the master to take an account of the cost of the new part of the wall, if the parties differed about the amount of such cost.

During Easter Sittings, May 20, 1886, *Robertson, Q. C.*, obtained an order *nisi* calling on the plaintiffs to shew cause

why so much of the verdict as declared the wall in question to be a party wall should not be set aside, and a verdict entered for the defendant; or a nonsuit entered; or for a new trial, on the ground that the verdict was contrary to law and evidence, the wall in question being wholly on the lands of the defendant, and there being no evidence that it was in fact a party wall, or that it had been built by the plaintiffs or any of their predecessors in title; but, on the contrary, it appeared conclusively that the said wall had been built by a predecessor in title of the defendant, and no evidence to shew that there had been an agreement between the plaintiffs and defendant, or their respective predecessors in title; that the said wall should be a party wall; (2) and also for misdirection of the learned Judge in telling the jury that the plaintiffs, and their predecessors in title, having used the west side of the said wall into which they had inserted the ends of the joists of the building afterwards erected on the west side of said wall, for more than twenty years, constituted the wall a party wall with all the rights and privileges appertaining thereto for the benefit of the plaintiffs; (3) and also in charging the jury that the defendant was bound by whatever agreement might be entered into between the tenant of the defendant's predecessor in title, who had a lease of the defendant's land for twenty years for building privileges, the lessor to take such buildings at a percentage of their value at the expiration of the term.

During Michaelmas sittings, November 29, 1886, *Robertson*, Q. C., supported the order, and referred to *Cubitt v. Porter*, 8 B. & C. 257; *Wiltshire v. Sidford*, 1 M. & Ry. 404; *Hutchinson v. Mains*, Al. & Nap. 155; *Matts v. Hawkins*, 5 Taunt. 20; *Taylor v. Stendall*, 7 Q. B. 634; *Murly v. McDermott*, 8 Ad. & E. 138; *Stedman v. Smith*, 8 E. & B. 1; *Wigford v. Gill*, 1 Cro. Eliz. 269; *Emden's Law of Buildings*, 2nd ed., 447; *Weston v. Arnold*, L. R. 8 Ch. 1084; *Knight v. Pursell*, 11 Ch. D. 412; *Watson v. Gray*, 14 Ch. D. 192.

Hardy, Q. C., contra, referred to *Sproule v. Stratford*, 1 O. R. 335; *Backus v. Smith*, 5 A. R. 341; *Cubitt v. Por-*

ter, 8 B. & C. 257; *Standard Bank of British South America v. Stokes*, 9 Ch. D. 68.

December 24, 1886. CAMERON, C. J.—The learned Judge's charge states the law too favourably for the plaintiffs. While it is true, that in the absence of proof of the ownership of a party wall the common use of it by the adjoining proprietors raises the presumption that these adjoining proprietors own the wall and the land on which it stands in common, the presumption is not conclusive of the fact and may be rebutted by proof of the actual title.

In *Matts v. Hawkins*, 5 Taunt. 20, cited by Mr. Robertson, the head note is as follows: "If two persons have a party wall, one-half of the thickness of which stands on the land of each, they are not therefore tenants in common of the wall, or of the land on which it stands. Although the wall was erected at the joint expense of the two proprietors."

It appeared from the evidence that the defendant was the owner of a piece of vacant or waste ground on which formerly stood a public house which had been pulled down about ten years before. The plaintiff was the owner of a workshop adjoining the defendant's land. The eastern wall of the plaintiff's shop had been the western boundary of the defendant's house before it was pulled down, and the defendant had built a shed against it. The plaintiff, without communicating with the defendant, raised this wall higher than it formerly was, for the purpose of adding to the buildings on his side, when the defendant pulled the wall down to its former height. The plaintiff brought an action of trespass against the defendant.

The evidence shewed that the wall was a proper party fence wall between the two buildings, and had been built about twenty-five years at the joint expense of both proprietors, and that it stood on the boundary line, so that part of the wall was on the ground of each proprietor. The defendant contended at the trial, that as no notice had been given him under the Building Act, 14 Geo. III. ch. 78, as required by sec. 38, of the wall being out of repair, the

plaintiff had no right to add to it or meddle with it, and also that the defendant was a tenant in common with the plaintiff of the wall; and therefore trespass would not lie. The jury found for the plaintiff; and Mansfield, C. J., reserved leave to move to enter a nonsuit on these objections. A rule *nisi* to enter a nonsuit was subsequently obtained and discharged.

Lord Mansfield, C. J., in giving judgment said, p. 23 : If these parties are tenants in common, no trespass lies, but I see not how they became tenants in common. Under the circumstances each had a right to the use of the wall; but the wall stands, part on the ground of each, and therefore is not the property of them as tenants in common; and each party for any injury done to the part which stands upon his own land, must have the ordinary remedy.

This case was considered in *Wiltshire v. Sidford*, which will be found reported in a note to *Cubitt v. Porter*, 8 B. & C. 257, at p. 259, and would seem to give some sanction, as does also *Cubitt v. Porter*, to leaving it to the jury in this case to say whether the wall was a party wall or not; but the case is quite distinguishable on the facts. The plaintiff and defendant were the owners of adjoining houses. The defendant pulled down his, and rebuilt upon and against a wall dividing the former premises which the plaintiff claimed as being his sole property. There was contradictory evidence as to the state of the plaintiff's premises and conflicting opinions of surveyors as to there having been two existing walls or only one, and as to the wall having been originally the exterior wall of the plaintiff's premises before the defendant's premises had been built. The learned Judge told the jury, some of whom had had a view, if they were satisfied that there had been originally but one wall, and that it had been jointly used by the owners of both premises for nearly a century, the date of the defendant's building, he was of opinion the action was maintainable, and he left it to the jury to say whether the wall was a party wall or not. The jury found it to be a party wall. The Court refused to disturb this finding,

and distinguished the case from *Matts v. Hawkins*, where the quantity of land which each party contributed was known; and said where that was not known the reasonable presumption from the common use of the wall was *prima facie* that the wall, and the land on which it was built, were the undivided property of both.

In the case in judgment, the boundaries of the respective properties are clearly defined. The defendant's ends at forty feet west of Market Street, and the plaintiffs' begins there. There is, therefore, nothing of uncertainty in the ownership of the land on which the wall stands, or by whom the wall was built. Both are made indisputably clear by the evidence.

It was part of the plaintiffs' case to establish their paper title to enable them to sue, and, in doing so, it was necessary to shew the boundary of the land covered by the paper title before the defendant could be liable to them. In proving their boundaries the surveyor called by them fixed their east limit at the west limit of the defendant's land; and there was no conflict of testimony whatever as to the boundaries of the respective properties, or as to the party who built the wall.

The conflict was upon the evidence as to whether the brick wall above the cellar was built on the old wall erected by the former proprietor John Lovejoy, or was built from the bottom of the cellar up by Morphy—a question that was really unimportant as by the deed of partition between John Lovejoy and Joseph D. Clement, the former granted and conveyed to the latter whatever part of the cellar wall would be contained within the distance of forty feet from the west side of Market street.

There is nothing in the evidence from which a grant of a part of the wall, or of a right to use a part of the wall, can be presumed. Whatever may have passed between Morphy, the tenant of Clement, and Lovejoy, could not have bound Clement who was no party to the arrangement whatever it may have been. The use of the wall made by the plaintiffs, their tenants and predecessors in title, could at most—the

title to the property on which the wall stood not being disputable—but give the plaintiffs the easement of inserting joists in the wall to support their floors, and of plastering and papering against said wall, the measurement of an easement being its extent at its inception : *Heward v. Jackson*, 21 Gr. 263. Whether they could obtain such an easement through the tenant against the landlord is not now in question. What the plaintiffs seek is the right, not to continue the use they now make of the wall, but to compel the defendant to increase the extent of the easement enjoyed, and to allow them to use the elevation, or new wall made by him, on the old.

I am not aware of any authority for such a claim. The acquisition of an easement to put one or ten joists in a wall does not give a right to put fifteen or twenty joists, or any number beyond ten, in such wall. If the wall is a party wall, in the sense that adjoining proprietors of it may have a common right of user of it, then if one raises such party wall to a greater elevation than it had before, the other is entitled to use the elevation as he likes, so long as he does not prevent an equally extensive enjoyment of it by him who has made it; and does not change its character of party wall by such user. *Sproule v. Stratford*, 1 O. R. 335, cited by Mr. Hardy, affirms this. In that case there was no doubt the wall was a party wall that was built to be used by the adjoining proprietors. But the case, cited in support of the opinion arrived at by the learned Chancellor, of *Weston v. Arnold*, L. R. 8 Ch. 1084, establishes that a wall, which is a party wall to a certain height, is not necessarily a party wall above that height. The case of *Sproule v. Stratford*, is quite distinguishable on the facts from the present case, as there the wall was built for the purpose of being a party wall by one of the adjoining owners, and the other built against it, and paid the other a fair proportion of the cost of building, and was therefore by the express agreement of the parties, having power to agree, a party wall.

The other cases cited by Mr. Hardy of *Backus v. Smith*, 5 A. R. 341, and *Standard Bank of British South America v. Stokes*, 9 Ch. D. 68, have no direct bearing upon the questions involved here.

In *Backus v. Smith*, the question was as to the right of the plaintiff to the support of the defendant's land to uphold the plaintiffs' house; and in the *Standard Bank of British South America v. Stokes*, there was no question about the wall being a party wall.

I am of opinion on the whole case that the learned Judge erred in his direction to the jury, and that there was no evidence from which the presumption could arise that the wall was a party wall, or from which an agreement on the part of the defendant's father with the plaintiffs that it should be so considered could be inferred—nothing in fact to warrant the inference that the wall was one in which the plaintiffs and defendant had a right or interest in common.

If the Court cannot properly on the evidence determine the rights of the parties without the intervention of a second jury, the case should be sent for a new trial. But the case is one which before the Judicature Act would have been in the sole jurisdiction of the Court of Chancery to grant the relief sought by the plaintiffs; and the evidence, in my judgment, clearly establishes that the plaintiffs are not entitled to the relief asked.

The proper course to pursue will be to vary the judgment directed to be entered by the learned Judge, by directing that judgment be entered for the plaintiffs for \$35 damages for the injury complained of by the plaintiffs in the third paragraph of their statement of claim, that is to say, by reason of the defendant causing snow, and ice and water to fall on the plaintiffs' roof in larger quantities than before the defendant altered the shape of the roof of his building; and dismissing the plaintiffs' claim in respect of the other causes of action and relief prayed in the plaintiffs' said statement of claim. The action being brought more to establish in the plaintiff a right to the party wall

than to recover damages, and the actionable cause of damage established by the evidence being more the temporary defective condition of the eave-trough than the faulty construction of the roof, the plaintiffs are not entitled to the injunction they have asked to restrain the defendant from permitting snow, ice and water to be discharged from the defendant's roof on to the plaintiffs' building.

The general costs of the cause should therefore go to the defendant, and the plaintiffs should have costs to be taxed on the County Court scale in respect of their claim for damages.

GALT and ROSE, JJ., concurred.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

IN RE THE HAMILTON AND MILTON ROAD COMPANY V.
THE CORPORATION OF THE TOWNSHIP OF EAST
FLAMBOROUGH

Municipal corporations—By-law, illegality of—Sale by one road company to another—Defective organization of purchasing company—Minority of corporator—Abortive sale.

The H. and M. Road Co., the owners of a certain road, and in possession thereof as a toll road, levying and collecting tolls thereon, assumed to sell the road to the H. and F. Road Co., who entered into possession thereof. Subsequently it was held by the Court of Appeal, on appeal from the judgment of Wilson, C. J., that the H. and F. Road Co. were not duly incorporated, because, while the Joint Stock Companies Act, R. S. O. ch. 152, requires at least five corporators to enable a company to be incorporated, there were not five here, one of the alleged incorporators being a minor. The corporation of the township of East Flamborough thereupon passed a by-law assuming possession of the road. *Held*, that the by-law was illegal, and must be quashed: that the effect of the judgment of the Court of Appeal was to restore to the applicants the franchise they held before the abortive sale took place, the road having been kept alive as a toll road, and repaired as such from time to time, and nothing having transpired to justify the municipal corporation in interfering with the road, or assuming possession and control of it, as the by-law authorized them to do.

An order *nisi* was obtained to quash by-law No. 260 of the Municipal Corporation of the Township of East Flamborough.

The by-law was passed on the 9th day of November, 1886, and was entitled, "By-law assuming possession of the road known as the town line road." After reciting that certain parties, alleging that they were a duly incorporated road company, under the name of the Hamilton and Flamborough Road Company, had for some years past been collecting toll from all persons travelling along the above mentioned road, alleging they were the owners of the said road, and that in a certain suit in the Common Pleas Division of the High Court of Justice for Ontario, wherein the said persons, suing under the name of the Hamilton and Flamborough Road Company, were plaintiffs, and John Ira Hall, was defendant, it was held by the Court of Appeal that no such

company existed, by reason whereof no such rights as the plaintiffs asserted were vested in them, and that it was deemed advisable that the municipality should pass a by-law assuming possession of the said road, known as the town line road; it was enacted by the reeve and council of the corporation in council assembled, that "this municipality do forthwith assume possession of the said road, known as the town line road; being the line of road commencing at the Upper Marsh bridge and running from thence in a northerly direction along the town line between East and West Flamborough to the village of Millgrove."

Lash, Q. C., supported the order *nisi*.

Osler, Q. C., contra.

January 24, 1887. CAMERON, C. J.—From the affidavits filed it appeared that the applicants, the Hamilton and Milton Road Company, were assumed to be the owners of the said road, and were in possession thereof as a toll road, and leased and collected tolls thereon; and while so in possession thereof in the year 1879, they sold the road in question, among other roads, to the Hamilton and Flamborough Road Company for the sum of \$31,000, and took from the said Hamilton and Flamborough Road Company a mortgage of the said roads and franchises to secure payment of the purchase money, of which a large part remained unpaid.

It further appeared that the Hamilton and Flamborough Road Company under the conveyance from the applicants entered into possession of the said road, and levied tolls thereon up to the time of passing the said by-law, which was passed after the decision of the Court of Appeal, in the case in the by-law referred to, reversing the decision of Chief Justice Wilson before whom the said case was tried.

The ground on which the Court of Appeal decided the case was, that there were only five corporators in the said Hamilton and Flamborough Road Company, and at the time of their assumed incorporation one of these was a minor, and so incapacitated from being a shareholder or corporator,

and the Joint Stock Road Companies Act, R. S. O. ch. 152, requires five persons of legal capacity to form a company.

There were other grounds alleged against the validity of the company; but the decision of the Court of Appeal was based on the objection stated.

Mr. Justice Patterson, in giving his reasons for the decision, recognized the status of these applicants as an existing company.

It also appears that the Hamilton and Flamborough Road Company have appealed from the judgment of the Court of Appeal to the Supreme Court of Canada.

The grounds taken in the order *nisi* to set aside the by-law are, that the by-law is *ultra vires* of the municipal council, and that the road was and is the property of the Hamilton and Milton Road Company.

Mr. Osler in shewing cause contended that the applicants had no *locus standi*; they had ceased to be a corporation by reason of abandonment and non-user of their franchises since 1879, and by the sale thereof, though such sale was abortive to give title to the defectively organized Hamilton and Flamborough Road Company, it demonstrated they, the applicants, had parted with the subject in respect of which they were incorporated, and so ceased to exist and had no interest in the by-law.

I think this by-law is illegal and must be quashed. The judgment of the Court of Appeal has determined—and while it stands unreversed it is binding upon me, sitting as a member of the High Court of Justice—and I think the effect of that judgment is to restore to the applicants the franchises they held before the abortive sale to the Hamilton and Flamborough Company. If there was no purchase there could be no sale—the whole proceeding was void. But the road was kept alive as a toll road, and repaired as such from time to time, and nothing has transpired to justify the municipal corporation in interfering with the road or assuming possession and control of it in the manner the by-law authorizes it to do.

Mr. Lash contended that the road being between two municipalities was a county road not within the jurisdiction of the township municipality.

I express no opinion on this point; for if the applicants are not an existing corporation and owners of the road, they would probably have no sufficient interest in the by-law to apply to quash it, and as I think they are an existing corporation and have not by what has transpired forfeited their corporate rights there is no necessity for determining the question.

The by-law must therefore be quashed, and with costs

Order nisi absolute.

[COMMON PLEAS DIVISION.]

GRAHAM V. THE LONDON MUTUAL FIRE INSURANCE
COMPANY.*Insurance—Mutual Company—Further subsequent assurance—Assent.*

To an action on a fire policy in a mutual insurance company, the defendants set up as a defence the eighth statutory condition, that the company were not to be liable for any loss "if any subsequent insurance be effected in any other company, unless and until the company assents thereto by writing, signed by a duly authorized agent." By 44 Vic. ch. 20, sec. 28 (O.), the Fire Insurance Policy Act is made applicable to mutual fire companies, except where the provisions of the Mutual Act are inconsistent with, or supplementary, or in addition thereto. Sec. 39 of the Mutual Act enacts in substance, that if a double insurance subsists in defendants' company and another company, the defendants' policy should be void, unless such double insurance subsists with the directors' assent endorsed on the policy, signed by the secretary, &c., or otherwise acknowledged in writing; and sec. 40, that whenever the company receives notification in writing of an additional sum being assessed on the same property in another company, the same shall be deemed assented to unless the company within two weeks after the receipt of such notice signify their dissent in writing. The defendants' policy was effected on the 31st July, 1884. On 4th January, 1886, the plaintiff effected a further insurance in another company for \$1,000. On 8th March, 1886, the plaintiff wrote defendants: "I hereby notify you that I have put a second insurance on my stock and farm implements." On 10th March the defendants replied, informing plaintiff that he had not "given the number of the policy or the amount of the insurance, or the name of the company." The plaintiff did not reply to this, because, as he said, he was away from home. The loss occurred on the 16th March. The jury found that the plaintiff did not, within a reasonable time after effecting the further insurance, notify the defendants; but that the notice was reasonably sufficient as far as he knew.

Held, that under sec. 39, the insurance was void; and that, under the circumstances, there could be no implied assent under sec. 40; and further, that the notice was not sufficient.

Per GALT, J.—The insurance was also avoided under the eighth statutory condition; and if sec. 40 could be held to be supplementary thereto, the plaintiff, by reason of the defective notice, did not come within it.

THE statement of claim alleged that on 31st July, 1884, the plaintiff effected with the defendants a policy of insurance against loss or damage on (among other things) his barn, stable, and driving-house, for the sum of \$600, and on the ordinary contents of his said buildings of \$800, making a total of \$1,400; and that on 18th March, 1886, while the policy was in force, the said buildings with their contents were destroyed by fire; and he claimed \$1,400.

The third ground of defence was, that the said policy was made subject to the statutory conditions contained in the Fire Insurance Policy Act, which, amongst other things, provided as follows: "The company is not liable for loss if there is any prior insurance in any other company, unless and until the company's assent thereto appears herein, or is endorsed hereon, nor if any subsequent insurance is effected in any other company unless and until the company assents thereto by writing, signed by a duly authorized agent." It then alleged that after the execution of the said policy, the plaintiff effected other policies without the consent of the defendants.

The cause was tried before Armour, J., and a jury, at Guelph, at the Fall Assizes of 1886.

There were several other grounds of defence taken, but as the judgment does not turn on them, it is unnecessary to set them out.

It appeared from the evidence, that on 4th January, 1886, the plaintiff effected a further insurance with the Ontario Mutual Insurance Company for \$1,000, of which no notice was given to the defendants until the 8th March, when he sent the following letter to the defendants, addressed to the manager:

"Dear Sir,—I hereby notify you that I have put on a second insurance on my stock and barn and implements."

To which the defendants replied on the 10th March:

"Dear Sir,—I enclose your favour of 8th inst. You neither give the number of your policy nor state the amount of other insurance, or name the company with which you have insured."

According to the evidence of the plaintiff he was absent from home when the answer was received, and consequently no reply was given.

The fire took place on the night of 16th March.

At the conclusion of the case the learned Judge submitted several questions to the jury.

The questions submitted to the jury, bearing on the above point, were as follows:

"Q. Did the plaintiff, within a reasonable time after he insured with the Ontario Mutual, notify the defendants thereof? A. No. Q. Was the notice thereof given by the plaintiff to the defendants reasonably sufficient? A. Yes, as far as he knew."

Upon the findings of the jury, the learned Judge directed judgment in favour of the plaintiff.

In Michaelmas Sittings, *MacMillan* (of London) moved on the findings to set aside the judgment for the plaintiff and to enter judgment for the defendants.

During the same sittings, December 1, 1886, *MacMillan* supported the motion. The statutory conditions are made applicable to mutual insurance companies by 44 Vic. ch. 20, sec. 8 (O.), and by the 8th condition the defendant should have been notified of the subsequent insurance, and their assent obtained. The policy was therefore avoided. Also under sec. 39 of the Mutual Act the subsequent insurance rendered the defendants' policy void. There was no consent of the directors signified by endorsement on the policy, signed by the secretary or other officer authorized to do so, or otherwise acknowledged in writing. Sec. 40 cannot assist the plaintiff, as no sufficient notification was given to the defendants upon which their assent within the two weeks could be presumed. The letter written to the defendants was clearly insufficient, as neither the company in which the insurance was effected, nor the sum insured was given, and the defendants in their reply inform the plaintiff of the insufficiency of the notice; but no further notice was ever given by the plaintiff. He referred to *Phillips v. Grand River Farmer's Mutual Ins. Co.*, 46 U. C. R. 334; *Compton v. Mercantile Ins. Co.*, 27 Gr. 334; *Harris v. Waterloo Mutual Fire Ins. Co.*, 10 O. R. 718; *Smith v. City of London Ins. Co.*, 11 O. R. 38; *Billington v. Provincial Ins. Co.*, 3 S. C. R. 182; *McQueen v. Phoenix Mutual Fire Ins. Co.*, 4 S. C. R. 660, 685; *McCrae v. Waterloo County Mutual Fire Ins. Co.*, 1 A. R. 218. The argument proceeded on other

points, but as the judgment does not turn on them they are not given.

MacLennan, Q.C., and Jacobs, contra. The defendants' company is a mutual company, and the conditions affecting it are prescribed by R. S. O. ch. 161. Section 39 provides that the insurance shall be void unless the double insurance subsists with the consent of the directors endorsed on the policy. Section 40, however, provides that after notification the additional insurance shall be deemed to be assented to unless the company so notified signify their dissent in writing within two weeks. The plaintiff here did notify the company, and there has been no dissent. The notice complied with the statute. All that the statute requires is, that the company should be notified that there is a further insurance. It is not necessary to give the name of the company and the sum insured. The company, if they wished, could have dissented within the two weeks, but this they have never done: *Dafoe v. Johnstown District Mutual Ins. Co.*, 7 C. P. 55; *Bruce v. Gore District Mutual Fire Ins. Co.*, 20 C.P. 207; *Gilchrist v. Gore District Mutual Fire Ins. Co.*, 34 U. C. R. 15; *Mason v. Andes Ins. Co.*, 23 C. P. 37; *Clarke on Insurance*, 162; *Kimball v. Howard Fire Ins. Co.*, 8 Gray 33; *Phillips v. Grand River Farmers' Mutual Ins. Co.*, 46 U. C. R. 334; *Compton v. Mercantile Ins. Co.*, 27 Gr. 334.

December 24, 1886. GALT, J.—The condition set forth in the defence is a statutory condition. This is a condition applicable to all fire insurance companies, and may be varied by the company; but in cases of mutual insurance companies, by the 39th section of "An Act respecting mutual fire insurance companies," R. S. O. ch. 161, it is positively enacted: "If an insurance subsists by the act or with the knowledge of the insured in the company and in any other office at the same time, the insurance in the company shall be void, unless the double insurance subsists with the consent of the directors, signified by endorsement on the policy, signed by the secretary or other officer authorized to do so, or otherwise acknowledged in writing."

This condition is therefore absolute and cannot be varied by the company. It enacts that if there is a double insurance which exists without the consent of the directors signified in the manner indicated, the policy shall be void. It was proved there was a double insurance existing at the date of the fire and no such consent had been given, and it was found by the jury that the plaintiff did not within a reasonable time notify the defendants thereof.

It does not, in my opinion, signify whether the plaintiff had or had not notified the defendants within a reasonable time; by the statutory provision, if the plaintiff without the assent of the directors effects a further insurance, the policy is void while such additional insurance exists without such consent.

It is true the 40th section enacts: "Wherever notification in writing has been received by a company from a person already insured of his having insured an additional sum on the same property in some other company, the said additional insurance shall be deemed to be assented to unless the company so notified within two weeks after receipt of such notice signify to the party in writing their dissent."

In the present case the notice to the defendants did not mention either the additional sum for which the insurance had been effected or the company with which it had been so done. Immediately upon receipt of the notice the defendants replied calling the plaintiffs attention to these omissions. It is manifest that there was not any consent on their part, and before any reply was received by them the fire occurred—the notice was sent on the 8th March and the fire occurred on the 17th or 18th,—so that no question of implied consent under the 40th section can arise.

But, in my opinion, no proper notice was ever sent. It is true the jury have found in answer to the question: "Was the notice thereof given by the plaintiff to the defendants reasonably sufficient?" "Yes, as far as he knew;" but the knowledge of the plaintiff as to the effect of the

notice is not the question before us, which simply is whether he gave notice "of his having insured an additional sum on the same property in some other company;" and it is manifest from the answer sent by the defendants that, as far as they were concerned, he did not.

By 44 Vic. ch. 20, sec. 28 (O.): The Fire Insurance Policy Act, ch. 162, shall apply to mutual fire insurance companies and to all policies to be hereafter issued by any mutual fire insurance company, except where the provisions of the Act respecting mutual fire insurance companies are expressly inconsistent with, or are supplementary and in addition to the said Fire Insurance Policy Act.

The conditions are printed on this policy; and by the eighth condition set out in the defence, it is expressly stated that the company is not liable for loss if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing, signed by a duly authorized agent.

Under this condition there can be no doubt the defendants are not liable in this case. But it may be said the 40th section, above referred to, is supplementary, and that in the case therein set forth the assent of the company is to be presumed. If this be so, in my opinion the plaintiff has not brought himself within the above section.

The rule will be made absolute to enter judgment for the defendants, with costs.

ROSE, J.—Mr. Maclellan rested the plaintiff's right to recover on the giving of the notice mentioned in section 40.

It seems to me the section requires notification, *i.e.*, "the writing which communicates information"—*Imperial Dictionary*—of the fact of intention to insure, or of his having insured: 1. "An additional sum." 2. "On the same property." 3. "In some other company."

The object of the notification is to enable the company to exercise its right on the facts thus made known, so as to be liable to assent or dissent.

A letter or notice which does not convey such knowledge, cannot, it seems to me, be held to be a notification upon which the company is bound to act.

I think the company was entitled to know the additional sum insured and the name of the other company, in addition to the property insured.

The letter in question did not convey such information, and I therefore am of the opinion that prior to the fire the policy was made void by the act of the plaintiff. The reply of the defendant company, written prior to the fire, shews that it deemed such information requisite to enable it to arrive at a decision.

I agree judgment must be for the defendants.

CAMERON, C. J., concurred.

Motion allowed.

[QUEEN'S BENCH DIVISION.]

STRETTON V. THE CITY OF TORONTO.

Municipal corporation—Action against—Negligence of employee—Course of employment—Corporation not liable.

In an action for damages for injury caused by negligent driving it appeared that a servant of defendants on his way for a wrench, for which he had been sent for the purpose of shutting off the water from a street hydrant which had burst, without the knowledge or consent of defendants, wrongfully took possession of a horse and buggy belonging to defendants' city commissioner, and therewith ran plaintiff down, causing the injury complained of.

Held, that defendants were not liable.

THE plaintiff, by his statement of claim, alleged, (2) that on 28th August, 1886, he was walking along the south side of King street, in the city of Toronto, at about five minutes before six o'clock in the afternoon; that he was obliged to cross Jarvis street, which is a street crossing King street at right angles thereto: that while he was crossing this street and before he could reach the foot pavement on the further side thereof, a one horse buggy or carriage of the defendants, under the charge and control of defendants' servants, was negligently, violently, and without any warning driven at a rapid and dangerous pace up Jarvis street, from the south of and across King street, and the wheels of the buggy or carriage struck plaintiff from behind and knocked him down and went over him as he lay prostrate and unconscious on the roadway, and without any stop was continued to be driven at the same violent, rapid, and dangerous pace northward up Jarvis street aforesaid. (3) That by the blow and fall and the driving the carriage wheels over him, plaintiff was bruised and injured in his side and back, and one of his feet was crushed, and he was injured internally, and in consequence thereof plaintiff was for upwards of five weeks confined to his bed, and was for sometime afterwards ill and suffering and unable to attend to his business, and incurred heavy medical and other expenses, and lost his employment and earnings; and he claimed \$500.

The defendants by their statement of defence denied, (1) that the buggy or carriage was defendants' buggy or carriage or that it was under the charge or control of defendants' servants, and they alleged that they did not know to whom the buggy or carriage belonged, or by whom it was driven. (2) They denied that the buggy or carriage was driven either negligently or violently, and without warning, or at a rapid or dangerous pace. (3) They denied that plaintiff was injured in the manner or suffered injury and damage as alleged. (4) They said that plaintiff might and could by the exercise of reasonable care and diligence have seen the buggy or carriage approaching him, and avoided any collision with it.

Joinder of issue.

The cause was tried at the last Winter Sittings of this Court at Toronto, before Rose J., and a jury.

It appeared that plaintiff was knocked down and severely injured by the negligent driving by one Bessey of a horse and buggy. This horse and buggy were not the defendants', but were the private property of Mr. Coatsworth, the city commissioner. Bessey was a servant of the defendants. A hydrant had burst, and Foley, a servant of the defendants, who was attending to it, sent Bessey to his (Foley's) house for a wrench. Bessey, on his way there, without the knowledge or authority of Foley, and without the knowledge or authority of Coatsworth, took the horse and buggy, which he found standing in front of Coatsworth's office, for the purpose of more speedily getting the wrench, and in driving for it ran down plaintiff. The damages were agreed to at \$200.

The learned Judge dismissed the action.

On February 18, 1887, *Wright* moved to set aside this judgment, and to enter judgment for the plaintiff for the amount of the damages agreed to.

McWilliams, shewed cause.

March 11, 1887. ARMOUR, J.—The defendants were sought to be charged for the negligent driving by Bessey, their servant, of a horse and buggy, causing injury to the plaintiff, and in order to establish this it was necessary for the plaintiff to shew that the driving of the horse and buggy was in the course of Bessey's employment as the servant of the defendants. This he failed to do. Bessey, it is true, was the servant of the defendants, and in going for the wrench was acting in the course of his employment; but he was not acting in the course of his employment in going for it with a horse and buggy which he had wrongfully possessed himself of without the knowledge or consent of the defendants, and they were consequently not liable for his negligent driving of this horse and buggy.

See *Goodman v. Kennell*, 3 C. & P. 167, S. C. 1 M. & P. 241; *Mitchell v. Crassweller*, 13 C. B. 237; *Storey v. Ashton*, L. R. 4 Q. B. 476; *Rayner v. Mitchell*, 2 C. P. D. 357.

The motion must be dismissed, with costs.

WILSON, C. J., and O'CONNOR, J., concurred.

Motion dismissed, with costs.

[COMMON PLEAS DIVISION.]

THE PETERBOROUGH REAL ESTATE INVESTMENT COMPANY
(LIMITED) v. PATTERSON ET AL.

SPECIAL CASE.

Will, construction of—Life estate by entireties—Estate tail—mortgage.

The testatrix by her will devised lot 15 to her son A. P. and his wife M. P., "and to their children and children's children for ever." Provided always that the aforesaid A. P. and M. P. shall not be at liberty, at any time, or for any purpose, to convey or dispose of the said lands, as it is my will that the same be entailed for the benefit of their children." The testatrix then devised all the rest and residue of her estate to M. P. "to have and to hold the same to her and her heirs," &c. "to her and their use and behoof forever." After the death of the testatrix A. P. and M. P. mortgaged lot 15 to the plaintiffs by a mortgage in fee simple.

Held, taking the whole of the will together, that A. P. and M. P. took an estate for life by entireties in lot 15, and their children an estate tail in severalty.

Held, also, that the said will did not contain such a restriction or alienation as to make the mortgage void; but that it was a valid charge for the lives of M. P. and A. P., and the survivors of them.

THIS was an action commenced to recover the amount due to plaintiffs under a mortgage made to them by the defendants Mary Patterson and Alexander Patterson, and for foreclosure, when it was agreed that the following special case should be stated for the opinion of the Court.

1. One Elizabeth Hartley being seized in fee simple of the east half of lot number 15, in the 8th concession of the township of Asphodel, in the county of Peterborough, containing one hundred acres, more or less, being the lands in question in this action, departed this life on or about the 14th day of December, A. D. 1870, having first duly made and published her last will and testament, in form sufficient to pass real estate according to the laws of the Province of Ontario.

The said will, so far as material, was as follows :

"My will is first : that my funeral charges and just debts shall be paid by my executors hereinafter named.

"The residue of my estate and property, which shall not be required for the payment of my just debts, funeral charges, and the expenses attending the execution of this my will, and the administration of my estate, I give devise and dispose of as follows to wit:—I give and devise to my beloved children, Alexander Patterson and to Mary Patterson, and to their children and children's children forever, all and singular that certain parcel or tract of land and premises, situate," &c., describing the lands above set out. "Provided always that the aforesaid Alexander Patterson or Mary Patterson shall not be at liberty at any time, or for any purpose, to convey or dispose of" the said land: "as it is my will that the same be entailed for the benefit of their children.

"I give and bequeath all the rest and residue of my estate, persona and mixed, of which I shall be seised and possessed, or to which I may or shall be entitled at the time of my decease, to Mary Patterson, wife of my son Alexander Patterson. To have and to hold the same to her, and her heirs, executors, administrators and assigns, to her and their use, and behoof forever. And I do nominate and appoint John Calder and John Pettigrew to be the executors of this my last will and testament.

"In testimony whereof, &c.

(Sd.) "ELIZABETH HARTLEY."

2. The defendants Mary Patterson and Alexander Patterson were the persons referred to in the said last will and testament; and the other defendants were the only children of the said Mary Patterson and Alexander Patterson.

3. Immediately after the decease of the said Elizabeth Hartley, the said defendants Mary Patterson and Alexander Patterson, with such of their children as had then been born, namely, all except the last named three, went to reside on the said lands in question, and had ever since, with the other children who had from time to time been born to them, continued to reside upon the said lands, and have been in the occupation and possession thereof.

4. At the date of the said last will and testament of the said Elizabeth Hartley, the only children born to the said defendants Mary Patterson and Alexander Patterson, were the said Elizabeth Ann, Mellissia Catharine, Edward Hartley and William Alexander.

5. The said defendants Mary Patterson and Alexander Patterson, being in possession of the said lands in question in the manner aforesaid, and being seised thereof for such estate, if any, as was devised to them under and by virtue of the said last will and testament of the said late Elizabeth

Hartley, by indenture of mortgage, made on the 28th of November, 1879, in pursuance of the Act respecting short forms of mortgages, granted and mortgaged to the plaintiffs, purporting to be in fee simple, the said lands in question, for securing payment of the amount therein mentioned.

The questions for the opinion of the Court were:—1. Whether, upon the death of Elizabeth Hartley, the defendants Mary Patterson and Alexander Patterson, under the said last will and testament of the said Elizabeth Hartley, became possessed of an estate tail in the said lands in question?

2. Whether the said last will and testament contained such a restraint upon alienation as to render a mortgage executed by the said Mary Patterson and Alexander Patterson, void?

3. Whether, if the Court was of opinion that the said Mary Patterson and Alexander Patterson became possessed of an estate tail in said lands, the execution of the said mortgage by the said Mary Patterson and Alexander Patterson, the plaintiffs, so effectually barred the entail as upon the foreclosure of the said mortgage by the plaintiffs, to give plaintiffs an estate in fee simple in the said lands in question?

If the Court should be of opinion in the affirmative, as to the first and third questions, and in the negative as to the second question, then judgment should be entered up for the plaintiffs for foreclosure of the said mortgage or for sale of said land, together with such costs as the Court might see fit to award.

If the Court should be of opinion in the negative, as to either the first or third questions, or in the affirmative as to the second question, the land in question should be freed from the said mortgage, and the plaintiffs should pay to the defendants such costs as the Court might see fit to order.

In any event the plaintiffs should be entitled to judgment against the defendants Mary Patterson and Alexander Patterson for the amount due to the plaintiffs under and

by virtue of the said mortgage, together with such costs as to the Court should seem meet.

And the Court should be at liberty to make such order relating to the matters in question, and as to costs, as to it should seem meet.

On October 15, 1886, the case was argued.

Poussette, Q. C., for the plaintiffs. The devise to "Alexander Patterson and Mary Patterson and to their children and childrens' children for ever," and the addition thereto, "Provided always that the aforesaid Alexander Patterson or Mary Patterson shall not be at liberty at any time or for any purpose to convey or dispose of" the land, "as it is my will that the same be entailed for the benefit of their children," are the parts of the will which raise the questions between the parties. If Alexander Patterson and Mary Patterson, the parents of the other defendants, took an estate for life, remainder to their heirs or the heirs of their bodies, they took themselves, according to the rule in *Shelley's Case*, an estate in fee or fee tail. It is contended the parents took an estate tail, for the words "and to their children's children" are words of limitation: *Mortimer v. Hartley*, 6 C. B. 819; *Pierce v. Win*, 1 Vent. 321; S. C. Pollexfen 435; *Trash v. Wood*, 4 My. & Cr. 324; *Wood v. Baron*, 1 East 259; *Webb v. Byng*, 2 K. & J. 669; *Roper v. Roper*, L. R. 3 C. P. 32; *Earl of Tyrone v. Marquis of Waterford*, 1 DeG. F. & J. 613; *Trust and Loan Co. v. Fraser*, 18 Gr. 19; R. S. O. ch. 100, sec. 3; *Re Lawlor*, 7 P. R. 242, shews that a mortgage in fee by a tenant in tail bars the entail.

J. K. Kerr, Q.C. for the infants. The parents did not take in tail but for life only. "Children" is here a word of purchase and not of limitation: *Wild's Case*, 6 Co. 460; Tudor's L. C. on Real Property, 3rd ed., 69. The word "forever" in the second passage "and to their childrens' children forever," is of no significance: *Wild's Case*, Tudor, 673; *Earls v. McAlpine*, 6 A. R. 145; *Bennett v. Wyndham*, 23 Beav. 521; *Croft v. Lumley*, 6 H. L. 672:

Smith v. Faught, 45 U. C. R. 484. The word "children" will have a different meaning according to their being or not being in existence at the time of the devise. If they are in existence at the time of the devise the word is a term of limitation: if not, it is a word of purchase: *Theobald on Wills*, 3rd ed., 295-311; *Byng v. Byng*, 10 H. L. 171; *Oates d. Hatterley v. Jackson*, 2 Str. 1172; *Jeffery v. Honywood*, 4 Madd. 398. If the word "children" is used to represent a class of persons, the parents in such a will as this will take for life, and the children in remainder in fee: *Jeffery v. DeVitre*, 24 Beav. 296. The proviso that the parents are not to convey is equivalent to the devise in *Jeffrey v. Scott*, 27 Gr. 314, where a direction that the devisee should not transfer, but that her children should inherit, was held to give her a life estate only. "Entailed" is not correctly used nor to be construed technically: *Dickson v. Dickson*, 6 O. R. 278.

Moss, Q. C., and *Clute*, for Mrs. Jordan (a married daughter). "Children" in this will is a word of purchase, and not of limitation: *Wild's Case*, 6 Co. 16 b., for children even in existence at the time the will was made. The children living at that time take as tenants in common, if the parents take only for life; and in common with the parents, if parents and such children take in tail: *Clifford v. Koe*, 5 App. Cas. 447-452; *Jordan v. Adams*, 9 C. B. N. S. 499; *Smith v. Smith*, 5 O. R. 690; *Tyrwhitt v. Dewson*, 28 Gr. 112. The parents being prevented from conveying shews they cannot take more than a life estate: *Benn v. Dixon*, 10 Sim. 636; *Doe d. McIntyre v. McIntyre*, 7 U. C. R. 156; *Combe v. Hughes*, L. R. 14 Eq. 415. The parents cannot claim a larger estate than for life by reason of the word "children," for that word does not necessarily mean a word of limitation; *prima facie* it is a word of purchase: *Hampton v. Holman*, 5 Ch. D. 183; *Doe d. McIntyre v. McIntyre*, 7 U. C. R. 156. The general intent of the devise was to benefit the grandchildren, and, for that purpose, to create an estate tail.

Nesbitt and Edmonson, for the parents, and for Elizabeth Ann Patterson, and Edward Hartley Patterson. The parents' estate is only for life with an estate tail in remainder in the children. The clause is "my will is that the same be entailed for the benefit of their children": *Jeffery v. Honeywood*, 4 Madd. 398, 403; 3 *Jarman* on Wills, 5th Am. ed., p. 181 *et seq.* It is said for the plaintiffs that if the word "children" be used as a word of purchase in one part of the will it is inconsistent to treat it as a word of limitation when used in another part of the will, but that may be done, and there is no inconsistency in doing so: *Clifford v. Koe*, 5 App. Cas. 447; 3 *Jarman* on Wills, 5th Am. ed., p. 177, &c.; *Tufnell v. Borrell*, L. R. 20 Eq. 194; *Roper v. Roper*, L. R. 3 C. P. 32. The rights of the children as between themselves are not raised, and need not be considered, that is, whether there is any different construction to be put upon the will by reason of some of the grandchildren being born before the making of the will, and before the testatrix's death, and some of them after the making of the will, and after the testatrix's death: *Armstrong v. McAlpine*, 4 A. R. 250. It is not denied that the rights of the children among themselves, that is, between those who were born at the date of the will, and those born since then, should be considered, as it is only the estate of the parents which is now in question.

Poussette, Q. C., in reply, referred to *Dickson v. Dickson*, 6 O. R. 278; 3 *Jarman* on Wills, 4th Eng. ed., 5th Am. ed., 389.

November 15, 1886. WILSON, C. J.—The general tenor of the decisions upon wills is, that the intent of the testator must be given effect to, if it can be done consistently with the rules of law; and for that purpose "heirs" or "heirs of the body," though terms of a highly technical description, and also the word "issue," will give place to the words "sons, daughters, child or children;" and words of limitation in their primary sense will be deemed to be words of purchase; and the general intent will yield to the particular

intent, so that words which would confer an estate in fee simple or fee tail in their technical sense, and according to their general intent, will be read as conferring a lesser estate as an estate for life on the devisee if there be super-added words or expressions shewing what the particular intent of the testator was, and if that intent can be lawfully carried out.

It is another undisputed rule of construction, that every part of the will shall be given effect to, so far as the law will permit, but no further, and that no part shall be rejected except what the law makes it necessary to reject. It is also said the words "child" or "children" will be taken in their ordinary sense, unless it appears a different construction should be given to them, their primary sense being the issue of the first generation : *Clifford v. Koe*, 5 App. Cas. 447, at p. 452.

But if the expression "children's children" be used ; as if a devise be to A for life and to his children for life and to their children's children, these words will confer an estate tail upon A, because an indefinite series or successive estates for life is unknown to the law, and the first taker will therefore take an estate tail. The rule in *Wild's Case*, 6 Co. 16, is, that if lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate tail ; for it is said "the intent of the devisor is manifest and certain that the children or issues should take, and as immediate devisees they cannot take, because they are not in *rerum natura*, and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate, therefore such words shall be taken as words of limitation." It was resolved, also, in the same case, that "if a man devises land to A and to his children or issue, and they then have issue of their bodies, there his express intent may take effect, according to the rule of the Common Law, and no manifest and certain intent appears in the will to the contrary. And therefore in such case, they shall have but a joint estate for life."

In *Jesson v. Wright*, 2 Bligh 1, at p. 50, the Lord Chancellor said: "The great judicial difficulty arises in the application of these rules to the words of each will."

And Wightman, J., in *Jordan v. Adams*, 9 C. B. N. S., at p. 496, in the Exchequer Court, said: "I have forborne to observe upon the cases which were cited upon the argument, the question in all the cases, as in this, being, what was the intention of the testator by the terms he has used in his will; and, as everything depends upon the words used, it seems to me that little assistance is derived from decisions upon terms which are not the same as those used in the will in question."

And it is said in *Clifford v. Koe*, 5 App. Cas., at p. 452, by the Lord Chancellor Selborne, that *Wild's Case* has been said to be a rule of construction and not of law; "but as a rule of construction, it has been law from the time of Lord Coke to the present day; and though the reasons on which it was originally founded may have been sometimes criticised, it has been uniformly followed in cases falling properly within its scope."

The will now in question is, that the testatrix "gives devises and disposes of" the residue of her estate and property as follows, to wit, "I give and devise to my beloved children, Alexander Patterson and Mary Patterson, and to their children and childrens' children for ever, all and singular, that certain parcel or tract of land, &c." If the will had stopped there, it is quite clear that Alexander Patterson and Mary Patterson—Alexander being the son of the testatrix, and Mary being his wife—would have taken an estate in tail by reason of the terms, "and to their children and childrens' children forever."

The following cases support that construction of that part of the will: *Trash v. Wood*, 4 My. & Cr. 324; *Earl of Tyrone v. Marquis of Waterford*, 1 DeG. F. & J. 613; *Hampton v. Holman*, 5 Ch. D., at p. 193.

Lord Cottenham C., said, in *Trash v. Wood*, at p. 328: "A direction to pay to 'children, and so on, forever,' must mean childrens' children, that is to say, *issue*; and for

want of *such children*, must mean for want of *issue*. The testatrix's object is, that *childrens' children* forever shall enjoy the property in perpetual succession; and she makes no gift over whilst any such are left. There is no way of effecting this purpose but by giving an estate tail to Jonathan Trash," [the named devisee]. There the devise was to him for life, and from and after his decease to pay the residue as aforesaid to his children, and so on, forever, and for want of children lawfully begotten, to the testatrix's daughters. And Lord Cottenham added: "If this be the meaning of the testatrix, as I think it is, the case is as nearly as possible the same as *Wood v. Baron*, 1 East p. 259, in which it was held the first taker, the parent, took an estate tail."

In *Wood v. Baron*, just mentioned, the devise was to Ann Wood of all the testator's estate, real and personal, "who shall hold and enjoy the same as a place of inheritance to her and her children or issue forever." And if Ann Wood "should die leaving no child or children, or if" Ann Wood's "children should die without issue" then over; and it was held the first taker took an estate tail, for the devise over was not to take effect if the first taker left no issue at the time of his death, but only upon the indefinite failure of issue.

In *Earl of Tyrone v. Marquis of Waterford*, 1 De.G. F. & J. 613; 6 Jur. N. S. 567, the devise was to "my brother" B., "and his children in succession." Held that these were words of limitation, and that B. took an estate in tail.

In *Hampton v. Holman*, 5 Ch. D. 183, the testator directed that on his daughter attaining twenty-one, the trustees should pay the income to her during her life, and should she live to become marriageable and die leaving a child or children born in lawful wedlock, then the trustees should apply the income to the support and maintenance of such child if only one, or if more than one, equally among "such children during their lives; and, *in like manner, to their children and childrens' children*, each family having

the father or mother's share ; or should her said daughter die previous to being married, or, after marriage leaving no child or children behind her born in lawful wedlock, or if having children as afore-described, upon them or their families becoming extinct," then over. The daughter survived the testator and attained twenty-one, she being his sole heiress-at-law and a spinster. Held, the gift over after that to the daughter was not void for remoteness, and that she did not take an estate tail in possession.

It was argued if she took for life, that she took an estate tail in remainder expectant on the death of her children, if she had any. The Master of the Rolls would not make any declaration as to her alleged future estate as it was against the practice of the Court to make a declaration as to future estates. The question then was whether her daughters took for life only, or in tail.

The Master of the Rolls said, at p. 192 : " We are brought to this whether there are or are not sufficient words in this will to shew clearly and unequivocally that the words *child* or *children* mean *issue* or *heirs of the body*. In other words, whether the case comes within the authorities which decide that a gift to a person for life with remainder to his children for life, with remainder to their children, creates an estate tail in the first taker ;" and he held there was nothing in the will to control the ordinary meaning of the words *child* or *children*. He did not think the expression and *in like manner to their children*, meant necessarily that such last named children should take *for their lives*. " It means [he said], simply that the property shall go, in like manner, that is to them successively, but not necessarily for their lives."

In *Mortimer v. West*, 2 Sim. 274, it is said, where the intent is to create a succession of life estates, it is not warranted in law ; and, in this case besides, the intent is, the estate is not to go over until there is a general failure of issue. The Court was obliged, therefore, to hold that the persons who were to take under the will [that is the first takers], took estates in tail.

In *Forsbrook v. Forsbrook*, L. R. 3 Ch. 93. Devise to C. and T., testator's nephews, and the sons of his late brother A. during their lives; and after the decease of C. and T. that the eldest son of C. and the eldest son of T. inherit the property for their lives; and so on, the eldest son of each of the two families to inherit the same forever; and that each two of the succeeding inheritors should inherit the property free from incumbrances. Held, that C. and T. took estates for their lives, with remainder to their eldest sons respectively for their lives, with remainder to C. and T. in tail male.

It was decided that plainly C. and T. took for their lives: that the eldest sons of C. and T. as *persona designata* for their lives; and that the words "and so on the eldest son of the two families of the name of Forsbrook to inherit the said property for ever," clearly indicated a series of inheritance constituting words of limitation; and that the words, the eldest son of *the two families* referred to the nephews C. and T. as the stirpes, and not to their eldest sons; and so C. and T. took in remainder as tenants in tail. "The same result," Rolt, L. J., said, at p. 99, "would be arrived at if we held it to be a perpetual succession of life estates—which we might have done if it had not been for the directions respecting incumbrances—and then applied the doctrine of *cyprès*, which would give the nephews an estate in tail male."

The next question is: What effect has the following clause of the will upon the previous part of it which constructively gives an estate tail to the parents? "Provided, always, that the aforesaid Alexander Patterson or Mary Patterson shall not be at liberty at any time, or for any purpose, to convey or dispose of" [the land aforesaid], "as it is my will that the same be entailed for the benefit of their children?"

The remaining clause of the will must also be considered, because it shows the testatrix knew what property she was giving absolutely to Mary Patterson, the mother of the children, and giving it in very different terms from

those in which she gave the east half of lot 15, in the 8th concession of Asphodel, to the said Alexander Patterson, her son, and Mary Patterson his wife.

That last clause is: "I give and bequeath all the rest and residue of my estate, personal and mixed, of which I may or shall be entitled at the time of my decease, to Mary Patterson, wife of my son Alexander Patterson. To have and to hold the same to her and her heirs, executors, administrators and assigns, to her and their use and, behoof for ever."

That clause is in strong contrast with the preceding one that the parents shall "not be at liberty at any time or for any purpose to convey, &c.," the land named in Asphodel, "as it is my will that the same be entailed for the benefit of their children."

What then is the meaning of the land being *entailed*, which is a strictly technical term, for the benefit of their children.

The land might be entailed for the benefit of the children in two ways: Firstly, by giving to the parents an estate in tail, when it would go to the children by course of devolution in tail; and secondly, by giving to the parents an estate for life, and to the children direct an estate in tail as purchasers.

That the parents should take in tail, and acquire the power to bar the entail and cut off the inheritance to the children, is not an argument of itself against such an effect being given to the will. For in *Seale v. Barter*, 2 B. & P. 485, at p. 494, Lord Alvanley, in answer to the argument, that the conferring a power upon the devisee to deal with the property in a particular matter, was inconsistent with his taking an estate in tail, said, the power, even if an estate in tail were granted, might have some effect; but he said "Independent, however, of the operation of this power I think there is a fallacy in the argument; for it supposes the testator knew the legal consequences of all the words which he had used, and all the privileges attached to a tenancy in tail. The same argument was

used in the great case of *Perryn v. Blake*; and in the Exchequer Chamber Mr. Baron Perrot exposed the fallacy of it; and it was agreed that a testator cannot be presumed to know the different privileges annexed to the several estates of tenant for life or tenant in tail."

And in *Clifford v. Koe*, 5 App. Cas. 447, at pp. 468-9, Lord Blackburn said: "The power given was superfluous if it was an entail." And he added: "If the testator had had a sufficient knowledge of the law he might have been aware that having given an estate tail, his son Henry" [as tenant for life] "with his eldest son, could, by the process of barring the estate tail, dispose of it in any way he liked; and consequently the effect was to give him a power which was not contradictory but superfluous; * * but *Seale v. Barter*, 2 B. & P. 485, decides that very point. * * I think, therefore the existence of the power is no reason why *children* should be taken as meaning words of *limitation*."

See also the observation of Lord Selborne, C., at p. 458, to the like effect, and Lord Campbell in *Earl of Tyrone v. Marquis of Waterford*, 1 DeG. F. & J., at p. 626.

Taking, therefore, the first clause of the will referred to:—"to Alexander Patterson and Mary Patterson and to their children and childrens' children for ever;" and the latter part of the second clause referred to, "as it is my will that the same be entailed for the benefit of *their* children;" that is, the children of Alexander and Mary Patterson,—I should have thought that, as the words of the first clause plainly conferred an estate in special tail upon Alexander and Mary Patterson, the parents, the last part of the second clause, "as it is my will that the same be entailed for the benefit of their children," if it had stood alone as the whole of the second clause would not necessarily have taken away that estate in tail from the parents; but that they, the parents, might nevertheless, have been entitled to an estate tail, because their taking such an estate would still have been for the benefit of their children; and the mere fact that the parents

could destroy that entail, so that the children might not get the benefit of it according to the particular intent of the testatrix, would not necessarily have the effect of reducing the devise to the parents by construction from an estate in tail according to the general intent, to an estate for life. It would merely appear that the testatrix "did not know the legal consequences of the words she was using, and all the privileges attached to a tenancy in tail." But the words in the earlier part of the second clause, "Provided always, that the aforesaid Alexander Patterson or Mary Patterson shall not be at liberty at any time or for any purpose to convey or dispose of" the said land, "as it is my will that the same be entailed for the benefit of *their* children," shew that the disposing power which a tenant in tail can exercise is expressly taken away from the parents, because the land is to be entailed for the benefit of their children—that is, the children of Alexander and Mary Patterson—and an estate in tail on the parents with a restraint upon their alienation of that estate cannot stand together.

There is very much to be said upon the words in the latter part of the second clause, "as it is my will that the land shall be *entailed* for the benefit of their children," that is, for the benefit of the parents' children, to confer upon such children an estate tail by purchase, and it may be I might have come to that conclusion if I had been restricted to these opposing words alone. But with the restraint upon alienation by the parents I feel more assured that the parents' devise must be held to be for their lives only.

It is necessary to read all the words of the will, as they must all stand and be construed and given effect to together if it be possible; and the only way of dealing with this will is by giving to it the meaning according to the particular intent of the testatrix, for the words will properly bear that intent; and, by so dealing with it, the parents will take for their lives, and their children will take an estate tail general as purchasers.

I do not think it is necessary to call in aid the doctrine of *cy-près*, as the interpretation I put upon it is that which the will itself may very fairly and without violence to any part of it have ascribed to it.

The cases on *cy-près* I may refer to are *Hampton v. Holman*, 5 Ch. D., at pp. 190, 1, 3; *Doe d. Gallini v. Gallini*, 5 B. & Ad. 621, at p. 640.

The will, therefore, in my opinion, may be interpreted as if the testatrix had in so many words spoken in this manner: "I give and devise to Alexander Patterson and to Mary Patterson, and to their children and childrens' children forever," the land in question. "And by the words 'and to their children and childrens' children forever,' I mean that they, *the said children*, shall take such an estate in the land that Alexander and Mary Patterson shall not, either of them, be at liberty at any time or for any purpose, to convey or dispose of the land to the prejudice of their children; and the way I take to do that is and 'it is my will' that the land be *entailed on the children of Alexander and Mary Patterson* so that the children shall not take through their parents, but independently of them": *Roper v. Roper*, L. R. 3 C. P. 32, in the Ex. Ch. at p. 36.

I am of opinion the remainder in fee simple will go to Alexander and Mary Patterson by entireties. But such remainder in fee will be of but little or any value, as it can be so easily defeated by the tenants in tail.

It is not very usual to find the parents in such a case contending for their having only a life estate in place of the larger estate in tail. But it is probably explained by the fact that a real estate investment company is the plaintiff, which has made a loan to the parents, and has taken from them a mortgage upon the land as if the parents had been tenants of the fee, or, at any rate, as tenants in tail; and the parents may therefore have more solicitude for their children than for their creditors; and it is natural they should, whatever else may be said of it. With that, however, I have nothing to say.

I may now refer to the following additional cases:

In *Fetherston v. Fetherston*, 3 Cl. & F. 67, Lord Brougham said, at p. 76: "If there is a gift first to A and the heirs of his body, and then in continuation, the testator, referring to what he had said, plainly tells us that he used the words '*heirs of the body*,' to denote A.'s first and other sons, then clearly the first taker would only take a life estate."

Devise to testator's two nieces equally between them, to take as joint tenants, and their several and respective heirs and assigns forever. Held, they took estates as joint tenants for life, with several inheritances on the death of the survivor: *Doe d. Littlewood v. Green*, 4 M. & W. 229.

Devise of all testator's real and personal estate to his wife for the use and benefit of herself and all his children, whether born of his former or of his present wife; and he appointed his wife and three other persons his executors. Held, by the Lord Chancellor, (Lord Hatherley), reversing the decision of Malins, V. C., that the wife took in joint tenancy with her children; although a very slight matter in the will in such terms will give the wife an estate only for life, and the remainder to his children in joint tenancy: *Newill v. Newill*, L. R. 7 Ch. 253.

Devise to trustees "for M. A. B. and her children, all my Quendon Hall estates in Essex, provided she takes the name of Cranmer and arms, and her children, with my mansion-house, furniture, plate, books, linen, &c., Archbishop Cranmer's portrait by Holbein, India cabinet and striking watch, and my diamond ear-rings and pins, as heirlooms with my estate." M. A. B. had, at the date of the will, four children, and several others were born subsequently. Held, affirming the decision of the Lords Justices in 8 DeG. M. & G. 633; 2 Jur. N. S. 124, which affirmed the decision in *Day v. Wood*, &c., that M. A. B. took an estate tail. For although the word "children" is *prima facie* a word of purchase, its primary signification is controlled by evidence of an intention to the contrary to be collected from the rest of the instrument: *Byng v. Byng*, 8 Jur. N. S. 1135, 10 H. L. Cas. 171.

I need not refer to any of the other cases.

I have just to repeat that the conclusion I come to is, that the parents take for life in entireties, by reason of the words of the latter part of the proviso, that the will of the testator is that the land "*be entailed for the benefit of their children;*" and I am strengthened in that opinion when I couple that language with the language of the first part of the proviso that the parents "shall not be at liberty, at any time or for any purpose, to convey or dispose of" the land; and that the children take an estate in tail in the land in question. What becomes of the ultimate remainder in fee simple, I have before stated; but it is of so little consequence, as the tenants entail can, by the simplest means, bar the entail and destroy the ultimate remainder. That is a matter, too, which I have not properly before me, because being a future estate, the Court does not assume to make any declaration respecting it: *Hampton v. Holman*, 5 Ch. D., at p. 187.

I have also to repeat that as no decision is asked for as to the rights or interests of the children of Alexander and Mary Patterson as between themselves; that is, as to the rights of those who were born at the time of the making of the will and those who have been born since the making of the will; and, as I have been expressly asked not to decide it, I say nothing as to their rights. I decide merely as to the interests taken by the parents at the present time under the will, and the interests which the children take under the will, treating for this purpose the children as of one and the same class, and in one and the same interest; and the result is, that the parents take for life in entireties, and *their* children take in fee tail in severalty.

The formal opinion which I deliver in answer to the questions submitted, is as follows:

To the first question. That upon the death of Elizabeth Hartley, the defendants, Mary Patterson and Alexander Patterson, under the last will and testament of the said Elizabeth Hartley, did not become seized or possessed of an estate tail in the land in question.

To the second question. That the last will and testament does not contain such a restraint upon alienation as to render the mortgage executed by the said Mary Patterson and Alexander Patterson void. For the mortgage is still a valid charge upon the mortgaged land for the joint lives of the said Mary and Alexander Patterson, and for the life of the survivor of them.

To the third question. As I am of opinion the said Mary and Alexander Patterson did take an estate by and under the said will in the land in question, the mortgage in fee simple which they gave upon the said land to the plaintiffs does not affect or prejudice the estate in tail of the children; and, as a consequence, it does not confer upon the plaintiffs an estate in fee simple or any other or greater immediate estate in possession than for the lives of Mary and Alexander Patterson as aforesaid, unless it may be the vested remainder in fee simple after the determination of the estates in tail general on the children; upon which, as that is a future estate, I do not make any absolute declaration.

As I find against the affirmative upon the first and third questions, and for the negative upon the second question, the judgment will be entered for the plaintiffs for foreclosure of the said Mary and Alexander Patterson as tenants for life, as aforesaid in the land in question, together with the costs of the plaintiffs upon this special case, and upon all the proceedings had or to be had or taken upon it, as I do not think they were or are free from blame in giving the mortgage in fee, and certainly are not free from blame in impeaching their own deliberate grant and in invalidating the security upon which they obtained a considerable loan of money.

And I declare that the land in question be freed and discharged from any further or greater claim upon it, than for and during the present lives of the said Mary and Alexander Patterson, and the life of the survivor of them; and that the plaintiffs pay to the defendants, other

than the said Mary and Alexander Patterson, the costs of the present case, and of all proceedings, had, or to be had, upon it, so far as such parties have been or may be put to costs.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

CONGER V. THE GRAND TRUNK RAILWAY COMPANY.

Railway—Accident—Limitation of action—C. S. C. ch. 66, sec. 83; 42 Vic. ch. 9, sec. 27 (D.)—R. S. O. ch. 128, sec. 5.

On 10th May, 1879, C. was seated in a car of the C. V. R. Co. standing on the railway of that company, when an engine of the defendants ran upon the railway of the C. V. R. Co., through gross negligence as alleged, and collided with the car in which C. was. He was injured in the collision, and died on 11th August, 1885, as alleged, from the injuries thus received. On 4th August, 1886, his executrix brought an action therefor.

Held, on demurrer, that the action was for injury sustained "by reason of the railway;" and that the limitation of six months, provided by sec. 83 of C. S. C. ch. 66—sec. 27 of 42 Vic. ch. 9 (D.)—applied and prevailed over the limitation of twelve months, provided for by sec. 5 of R. S. O. ch. 128; and therefore the action was barred.

THIS was an action brought by the plaintiff as executrix of the last will and testament of Peter D. Conger, deceased, to recover damages from the defendants for the benefit of the plaintiff and Frederick Conger, one of the children of the said Peter D. Conger.

The statement of claim alleged.

2. The defendants are and were at the time of the grievances hereinafter mentioned a corporation, owning and operating a line of railway running through the Province of Ontario, and known as the Grand Trunk Railway of Canada.

3. On the 10th May, 1879, Peter D. Conger was a passenger lawfully in a car of a certain railway company

known as the Credit Valley Railway Company upon the Credit Valley Railway, &c., which was connected with the Grand Trunk Railway at a point near the Carleton station of the Grand Trunk Railway, &c., by means of a switch, by the opening of which locomotive engines and cars might pass from the Grand Trunk Railway to and upon the Credit Valley Railway, and from the Credit Valley Railway to and upon the Grand Trunk Railway.

4. The switch belonged to the defendants, and was situate upon their line forming part thereof, and was under the management and care of a switchman in the employ of the defendants, whose duty it was to open the said switch when the same required to be opened for the passage of locomotives and cars from the Grand Trunk Railway to and upon the Credit Valley Railway, or from the Credit Valley Railway to and upon the Grand Trunk Railway, when he received proper orders and instructions so to do, and when the same might be opened with safety; and to keep the switch closed at all other times so as to prevent the passing of locomotives and cars from one of the railways to and upon the other of them.

5. On the 10th May, 1879, immediately before the happening of the collision hereinafter mentioned, the passenger car of the Credit Valley Railway Company, in which Peter D. Conger was a passenger, was lawfully standing on the Credit Valley Railway a short distance from the switch, and a locomotive engine of the defendants, in charge of and driven by an engine driver in their employment and in the usual course of his said employment, was proceeding at an unusually high and improper rate of speed in a westerly direction along the Grand Trunk Railway to the east of, and approaching from the east, the switch, on its way from Toronto to Carleton station, when the switchman in the defendants' employment, who was then in the usual course of his employment as such switchman in charge of the switch, opened the same upon the approach of the locomotive engine so as to allow and cause the passing of the locomotive engine from the

Grand Trunk Railway to and upon the Credit Valley Railway, whereby and by reason of the high and improper rate of speed at which the locomotive engine was then being driven by the engine driver of the defendants, who in the ordinary course of his said employment was in charge thereof, the said locomotive engine, before it could be stopped, passed to, upon and along the Credit Valley Railway, and was driven against and violently collided with the passenger car of the Credit Valley Railway Company then lawfully standing upon the Credit Valley Railway as aforesaid, and in which Peter D. Conger then lawfully was as such passenger as aforesaid.

6. The locomotive engine was not required or intended by the defendants, or by the engine driver in charge of the same, to go to or upon the Credit Valley Railway, and the switchman did not receive any orders or instructions to open the switch at the time he so opened the same, and from the position in which the passenger car was standing, and the high rate of speed at which the locomotive engine was proceeding, it was extremely dangerous to open the switch, as the switchman then well knew, or by the exercise of ordinary and proper care and vigilance would have known; and in so opening the switch he was guilty of gross negligence.

7. The engine driver was also guilty of gross negligence in driving the locomotive engine at such unusually high and improper rate of speed, and such negligence on his part contributed, with the negligence of the switchman, to cause the collision.

8. The defendants were also guilty of gross negligence in that they did not provide for proper signals for the opening and closing of the said switch, or any proper and efficient means of conveying orders and instructions to their switchmen in regard to the opening and closing of the said switch, and did not make or enforce proper or effectual rules or regulations in reference thereto, or adopt the usual and reasonable or any sufficient means of guarding against danger and injury to passengers travelling upon the

railway, by reason of the said switch, and such negligence on their part also contributed to the happening of the said collision.

9. The collision was caused by the gross negligence of the defendants, and of their switchman and engine driver while acting in the usual scope of their employment as such servants of the defendants.

10. By the said collision the passenger car in which Peter D. Conger then lawfully was as such passenger as aforesaid was forced from off the rails of the Credit Valley Railway and broken, and Peter D. Conger was thrown with great violence from the seat in the car, and was crushed beneath heavy portions of the car, whereby several of his ribs were broken, and he was otherwise wounded, and bruised, and sustained serious and permanent internal injuries from which he never recovered.

11. On the 11th August, 1885, and within twelve months before the commencement of this action, Peter D. Conger died by reason of the internal injuries sustained by him from the collision as aforesaid.

12. At the time of his death Peter D. Conger left him surviving his widow, the plaintiff, and Maud Conger, Jessie Conger, Helena Conger, and Frederick Conger, his lawful children, who still survive him.

Statement of defence.

"Not guilty," by Statute C. S. C. ch. 66, sec. 83, also 42 Vic. ch. 9, sec. 27 (D.), both public Acts.

2. The defendants further say that the alleged accident and injury in the statement of claim mentioned happened more than six years before the death of Peter D. Conger; and at the time of his death all causes of action to Peter D. Conger, if any such existed at any time, which the defendants do not admit, was and were barred by the provisions of the several statutes relating to the limitations of actions which were then and now are in force in this Province; and the defendants submit that such being the case the alleged causes of action are therefore also barred to the plaintiff; and further that this action was not brought by the plaintiff

within the time limited to the plaintiff by the said statutes, that is, within six months next after the death of Peter D. Conger.

The plaintiff demurred to so much of the defendants' statement of defence as is contained in the second paragraph thereof,—and which alleges that all causes of action are barred to the plaintiff by the provision of the several statutes relating to the limitations of actions which were at the time of the said alleged accident and injury in the statement of claim mentioned and now are in force in this Province; and which further alleges that this action was not brought by the plaintiff within the time limited to the plaintiff by the said statutes;—on the grounds:

1. The said statutory limitations of six years and six months respectively do not, nor does either of them, apply to this action, which is created by a special statute limiting the period of one year from the death of the deceased as the time within which the action may be brought.

2. The cause of action did not accrue until the death of the deceased, and could not be barred by any statute of limitation in his lifetime.

Reeve, Q.C., in support of the demurrer.

Osler, Q.C., contra.

January 17, 1887. O'CONNOR, J.—It was argued for the plaintiff that inasmuch as the accident happened, not on the Grand Trunk Railway proper, but on the Credit Valley Railway, it could not be said to have happened "by reason of the railway;" and therefore the defendants were not entitled to the protection of the six months time allowed for the commencement of the action. But a reference to the statements contained in the 3rd, 4th, and 5th paragraphs of the plaintiff's statement of claim completely refutes that argument.

Bearing these paragraphs in mind, I see no real distinction, with reference to the liability of the defendants, and the reason of the liability, between the consequences result-

ing from the accident, happening where it did, and the consequences of a like accident, happening on the defendants' own railway. It follows, then, that the damage was done "by reason of the railway:" *May v. Ontario and Quebec R. W. Co.*, 10 O. R. 70, where the cases are reviewed.

Then, should the action have been brought within six months after the damage done; or was the plaintiff entitled to bring an action at any time within the twelve months allowed by the Accident Act, commonly called Lord Campbell's Act, notwithstanding the limitation clause of the Railway Act.

There is a difference of expression between the two limitations. The 4th section of the Accident Act, C. S. C. ch. 78, the 5th section of R. S. O. ch. 128, is: "Every such action shall be commenced within twelve months after the death of the deceased person."

The expression of the 83rd section of the Railway Act, C. S. C. ch. 66, and of the 27th section of the Consolidated Railway Act, 1879, is: "All suits for indemnity for any damage or injury sustained by reason of the railway, shall be instituted within six months next after the time of the supposed damage sustained, or if there be continuation of damage, then within six months next after the doing or committing of such damages ceases, and not afterwards."

This language explicitly forbids the bringing of the action after the expiration of the six months, and so far limits the permission of the Accident Act.

I think the limitation of the Railway Act must govern and prevail in this action: *Cairns v. Water Works Commissioners of Ottawa*, 25 C. P. 551.

As this action was brought more than six months (though within twelve months) after "the death of the deceased person," it is barred, and cannot be proceeded with; and it is therefore unnecessary to decide the other question raised as to the ordinary limitation of six years.

The demurrer is overruled, with costs.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

McDOUGALL ET AL. V. HALL.

Deed—Omission to tender for execution—Dispensing with tender—Specific performance—Judicature Act, sec. 16, sub-sec. 8.

The general scope of the Judicature Act, and especially sec. 16, sub-sec. 8 requires that the matters in controversy between the parties may be completely and finally determined, and multiplicity of legal proceedings concerning such matters avoided; so that, whenever a subject of controversy arises in an action, the Court should, if possible, determine it so as to prevent further and useless litigation.

In an action for the specific performance of an agreement to convey land, the defendant set up as a defence that there was no tender of a deed for execution before action commenced; but at the same time indicated that if there had been a tender it would have been refused.

Held, that though, in strictness, there should have been a tender, yet, under the circumstances, it should be dispensed with, and judgment was entered for the plaintiffs.

THE statement of claim alleged that in the year 1884, the plaintiff Gehl discovered a parcel of land containing a vein or deposit of silver ore, known as Silver Hill, situated in unsurveyed territory in the district of Thunder Bay, about two miles north-east of Silver Mountain location R. 54: that on the 14th October, 1884, an agreement was entered into between the plaintiffs and the defendant, whereby the plaintiff Gehl agreed to grant to the plaintiff Macdougall and the defendant an undivided five-eighths interest therein, namely, four-eighths to the defendant, and one-eight to the plaintiff Macdougall, the consideration therefor being that the defendant and the plaintiff Macdougall should cause a proper survey, &c., to be made of same under R. S. O. ch. 29, and to apply for and obtain a patent therefor, paying the full price thereof to the Crown: that the plaintiffs, trusting in the defendant, authorized him to obtain the patent in his own name, but he was to convey to the plaintiff Gehl three-eighths interest, and to the plaintiff Macdougall one-eight interest: that the defendant had the surveys &c. made, and obtained a patent, dated 7th November, 1884, granting, to the defendant the whole of

the said discovery and land, described in the patent as mining location R. 70, lying north-east of Whitefish Lake in the said district of Thunder Bay.

The sixth paragraph alleged that the plaintiffs had demanded from the defendant a grant or conveyance to them of the undivided shares or interests as above set out, but that the defendant refused to grant or convey the same to the plaintiffs.

The plaintiffs prayed that the agreement should be specifically performed, and the shares conveyed to them.

The statement of defence, set up, amongst other defences, (par. 10) that the plaintiffs did not, nor did either of them, before this action demand from the defendant the grant or conveyance to them, respectively in paragraph six of the plaintiffs' statement of claim, nor did they or either of them before this action tender to him a conveyance thereof for execution.

The cause was tried before O'Connor, J., without a jury, at Port Arthur, at the Summer Assizes of 1886.

Gorham, for the plaintiffs.

McArthur, Q.C., and *A. S. Wink*, for the defendant.

At the conclusion of the case the learned Judge reserved his decision, and subsequently delivered the following judgment :

September 4, 1886. O'CONNOR, J.—At the conclusion of the hearing of this case, I thought I should have to dismiss this action on the technical ground, that no demand was proved to have been made on the defendant for a deed of conveyance, nor was a conveyance tendered him for execution before action.

Had I dismissed the action, the plaintiffs would merely be compelled to make demand or tender the conveyance for execution by the defendant and commence *de novo*. This would merely involve delay, and reduce the matter otherwise to a question of costs, without any reference to the merits.

Upon further consideration however, I concluded that the action could, and, under the law as it now stands and is generally understood, it ought to be otherwise disposed of.

It seems to me that the general scope, spirit and meaning of the Judicature Acts, and especially of sub-section 8 of section 16 of the Act of 1881, require that the matters in controversy between the parties may be completely and finally determined, and multiplicity of legal proceedings concerning such matters be avoided.

In *Re Tharp*, L. R. 3 P. D. 76, at page 81 (in C. A.), Jessel, M. R., speaking of the like Acts in England, says; "I think it is plain that the meaning of the Legislature was this, that whenever a subject of controversy arises in an action, the Court should, if possible, determine it so as to prevent further and needless litigation."

The remarks of Patterson, J. A., in *Peterkin v. MacFarlane*, 4 A. R. 25, at pp. 43, 44, 45, commenting on section 50 of the Administration of Justice Act of 1873, are in the same direction, and much to the same effect.

Rule 178 (*MacLennan's* Judicature Act, 2nd ed., p. 323, 324) gives power to make all necessary amendments to the same end, "for the purpose of determining the real questions or question in controversy between the parties."

The English cases referred to by Mr. MacLennan point to the same end, and are pregnant with the same consideration.

In this case there should in strictness have been a demand or a tender of conveyance for execution before action was commenced, in order to place the defendant explicitly in the wrong. No such demand or tender was made. But the defendant, in his statement of defence, indicates clearly that if such demand or tender had been made, he would have refused to comply therewith. That proceeding would therefore have been futile.

The statement of defence leaves, however, no reason to doubt, that if a demand or tender had been made, the defendant would not have complied therewith; the action would then have proceeded, and the defendant would have denied,

as he has denied, the right of the plaintiffs, or either of them, to recover.

In his statement of defence, the defendant avails himself of every possible defence, technical and otherwise, to defeat the claim of the plaintiffs.

It is evident that he made up his mind to defraud the plaintiffs (and especially the plaintiff Gehl) of their rights; and the statement of defence is simply a bold attempt at such a fraud.

In the statement of defence he denies that a demand or tender of conveyance had been made; but seems to have been invited to that by the allegation in the sixth paragraph of the plaintiffs' statement of claim; and he does not set it up otherwise as a substantive defence. I think I shall best comply with the letter and spirit of the law as, according to my view, it now is, by ordering that judgment be entered for the plaintiffs, declaring that they are severally entitled to the several undivided interests, or shares which they claim, that is, the plaintiff Macdougall to one-eighth, and the plaintiff Gehl to three-eighths, of the property—the mining location, R. 70 in the pleadings mentioned; and that a vesting order be issued accordingly; or that the defendant be ordered to execute conveyances to the plaintiffs severally of such undivided shares; and that the costs of the issue upon the sixth paragraph of the plaintiffs' statement of claim, and the tenth paragraph of the statement of defence, be taxed and allowed to the defendant and paid by the plaintiffs; and that the costs of the other issues be allowed to the plaintiffs and paid by the defendant.

Judgment accordingly.

[CHANCERY DIVISION.]

DAWSON V. MOFFATT ET AL.

C. S. U. C. ch. 73—Marriage settlement—Wife's after-acquired personal property.

It is evident from the scope of C. S. U. C. ch. 73 that notwithstanding a marriage settlement any separate personal property of a married woman acquired after marriage and not coming under or being affected by such settlement shall be subject to the provisions of the Act in the same manner as if no such settlement had been made, and as to such property the married woman shall be considered as having married without a settlement.

THIS was a petition by Caroline Moffatt, the wife of the defendant Lewis Moffatt, for the payment out of Court of the sum of \$1,698.84, which the petition alleged belonged to her and was part of a fund of \$3,578.98 found due to said Lewis Moffatt in connection with a claim for the cancellation of a certain Government contract.

The petition was argued on June 14th and October 28th, 1886, before Boyd, C.

It appeared that in the year 1876 the petitioner had purchased from the assignee in insolvency of the said Lewis Moffatt among other effects all his interest in said claim for the sum of \$1,500, and had taken a bill of sale of the same: that the sum of about \$25,000 had been recovered in the Exchequer Court of Canada in a suit of *McMaster et al. v. The Queen* as the damages for the cancellation of said contract: that this suit had been brought for the purpose of ascertaining the different proportions of said \$25,000 due to the different claimants thereon, and that the sum of \$3,578.98 had been found due to the defendant Lewis Moffatt, part of which was his claim before his assignment, and part of which sum was the claim of another purchased by him since his assignment.

It also appeared that in 1842, when the said Lewis Moffatt was married to the petitioner, there was a marriage settlement entered into just previous to the marriage.

Wallace Nesbitt and *F. C. Moffatt*, for the petitioner. The petitioner is entitled to the amount asked for, and it should be paid out to her.

C. L. Ferguson, for an execution creditor of *Lewis Moffatt*. The wife is not¹ entitled to the money, but the husband is. Notwithstanding the assignment the wife has so allowed her husband to deal with the fund as to reduce it into his possession and make it liable to his creditors: R. S. O. ch. 125, sec. 2. There was a marriage contract in this case, and that takes it out of the statute and leaves it as at Common Law: *Mitford v. Mitford*, 9 Ves. 96; *Gatens v. Mauley*, 6 M. & W. 423, 3 C. L. T. 74 (Article); *Dufresne v. Dufresne*, 10 O. R. 777; *Black v. Coleman*, 29 C. P. 507; *Balsam v. Robinson*, 19 C. P. 265. The petition shews that the money was recovered as damages by the husband. There has been a reduction into the husband's possession, and it was complete when the husband was in a position to issue execution: 1 *Roper* on Husband and Wife, 2nd ed., 220; *Jones v. Cuthbertson*, L. R. 7 Q. B. 218; *Gabriel Miles's Case*, 1 Mod. 179; *Scrutton v. Pattilo*, L. R. 19 Eq. 372; *Rumsey v. George*, 1 M. & S. 179; *Bosvil v. Brander*, 1 P. Wms. 458; *Rees v. Keith*, 11 Sim. 388; *Kehoe's Choses in Action*, 128, 133; *Murray v. Lord Elibank*, 1 W. & T. L. C., 5th ed., 476. The claim of the wife is not raised until the last moment, although there has been litigation for years on the subject of the fund, and she has forfeited it by laches.

Nesbitt, in reply. The settlement cannot take away the petitioner's rights under the statute and in any event it does not relate to the petitioner's property. There was no reduction into possession because the husband assigned in 1875. He sued for it as the wife's trustee merely and his creditors cannot be in any better position than he is. The fund is in Court and he has never been in possession of it. It was paid in to the credit of the partnership, that is to the credit of all those who had claims on the fund. Before his share was ascertained he had no absolute dominion over any part of it. He was a joint owner only, if even that, of a fund in a solicitor's hands but he had no dominion over

it. I refer to *Kloepper v. Gardner*, 10 O. R. 415; *Lush on Husband and Wife* 54, 62; *Brett v. Greenwell*, 3 Y. & C. Ex. 230; *Nicholson v. Drury Building Estate Co.*, 7 Ch. D. 55; *McCready v. Higgins*. 24 C. P. 233.

November 24, 1886. BOYD, C.—The argument for the creditors was that any marriage settlement irrespective of its contents deprived the wife of the benefit of the Married Woman's Act applicable to this case, *i.e.*, Consol. Stat. U. C. ch. 73, and reliance was placed for this construction of the Act upon language used by one of the Judges in *Balsam v. Robinson*, 19 C. P. 263. But it is evident from the scope of the Act itself that notwithstanding any settlement any separate personal property of a married woman (as in this case) acquired after marriage and not coming under or being affected by such settlement shall be subject to the provisions of the Act in the same manner as if no such settlement had been made, and as to such property the married woman shall be considered as having married without settlement, sec. 19 p. 795. This disposes of the petition in the wife's favour as it cannot be contended that this property is affected by the settlement in the sense of the statute.

After acquisitions of personalty by the wife are referred to in the settlement but it is stipulated that the husband shall have only such rights therein as may be given to him by the existing laws of Upper Canada. That is to say, his rights are to be measured by the law at any given time, so that the parties have by contract rather put themselves under the provisions of this Married Woman's Act, than derogated from its operation by the execution of this settlement.

The inaction of the petitioner till the last moment, and the necessity of having strict proof of her claim as against the creditors, induces me to say that the costs of the opposing creditors of this application should be paid out of that portion of the fund in question which I now declare to be the property of the petitioner. After deducting these costs the balance to be payable to her.

[CHANCERY DIVISION.]

COYNE V. BRODDY ET AL.

Statute of Limitations—Trustee and cestui que trust—Principal and agent.

J. C. died in 1876, and left an estate very much embarrassed to his wife, the plaintiff. B., an active business man, acted as agent for the plaintiff in settling up the estate and induced the creditors generally to give up their claims or settled them on terms favourable to the plaintiff. He also sold a house, part of the estate, for her, and a portion of the purchase money was taken in the notes of F. the purchaser. The notes came to the hands of S. a brother of the plaintiff who held them and collected some of them for her. Some little time after B. asked S. if the notes were all paid, and when he was told some of them were not, he stated that the money for a loan to F. was then going through his hands, and if he had the notes he could collect them and so "save them for the widow and orphans out of that money." The notes were given to him and he collected them, but the money was not paid over by him but remained unclaimed for eight years until he made an assignment for the benefit of creditors.

In an action against him and his assignees in which the defendants set up the Statute of Limitations as a bar, and the plaintiff contended that B. was a trustee under an express trust, and that the statute could not be pleaded.

Held, by CAMERON, C. J. C. P. D., (at the trial) that B. received the notes as agent of the plaintiff for the purpose of collecting the money as agent of the plaintiff, and that the statute was a bar. There was no express trust but only such a trust as arose from the relation of principal and agent, which did not prevent the operation of the statute.

On appeal the Divisional Court was evenly divided, and this judgment was affirmed.

Per BOYD, C.—B. undertook to hold the notes, not for safe custody as a depositee nor for investment as a scrivener, but as an attorney or agent to collect and remit—this established a fiduciary relationship, but not that of a trustee and *cestui que trust* to all intents. A breach of trust arose on B.'s part when he failed to remit and kept the money an unreasonable time, which indicated his intention to convert it to his own use. From the time plaintiff knew or might have known that, they were at arms length—the retention was an *adverse* possession. Plaintiff's duty then was to make him pay as a debtor, and if she failed to resort to the usual remedy within six years, he had the right to plead the statute. *Cook v. Grant*, 32 C. P. 511, distinguished.

Per PROUDFOOT, J.—The deposit and the undertaking was an entire single transaction, and a trust attached upon the notes given to B; they were not to become his property: special confidence was reposed in him to secure their payment out of an entirely distinct transaction, and to save them for the widow and orphans, the trust continued until the completion of the transaction by the money being placed in the widow's hands—the notes were not due when confided to B. He was not a mere agent to collect, but he was to use an influence to get better security or anticipated payment. *Cook v. Grant*, *supra*, considered.

THIS was an action brought by Mary C. Coyne against William Broddy for an amount due by him, and against W

H. McFadden and E. G. Graham, the last two being the assignees for the benefit of creditors of Broddy, for a declaration of her right to rank on Broddy's estate for such amount.

The plaintiff sued for the amount of certain promissory notes collected for her by Broddy in the year 1877, and alleged that he was a trustee for her of the amount collected.

The defendants pleaded the Statute of Limitations.

The action was tried at the Fall Assizes of 1886, at Brampton, before Cameron, C. J., C. P. D.

Laidlaw, Q. C., for the plaintiff.

Lash, Q. C., for the defendants.

It appeared that the plaintiff's husband, John Coyne, died in 1876, leaving everything that he had to his wife, but his estate was very much embarrassed with debt: that defendant Broddy, who was an active business man, and acted as agent of a great many people in the neighbourhood, had acted as agent for her, taking a very active interest in her affairs, and in effecting a compromise with the creditors of the estate by which the large majority of them assigned to or released their claims in favour of the plaintiff: that he also sold a house, belonging to the deceased, for the plaintiff, and that part of the purchase money therefor was taken in promissory notes of the purchaser, one Fletcher; these notes were placed in the hands of a brother of the plaintiff, and were subsequently handed to Broddy to collect for the plaintiff, and were collected by him but never paid over.

Mr. Scott's (the plaintiff's brother) evidence on this part of the case, which was not contradicted, was as follows:

To Mr. Laidlaw—I am a brother of the plaintiff in the action. Q. And the plaintiff is the widow of the late John Coyne? A. Yes. Q. Do you remember about the year of his death? A. I cannot fix the year; somewhere about ten years ago, more or less. Q. Do you recollect the real estate he held at the time of his death? A. He owned some property on Scott street,

in Brampton—a house and some lots where he was living. Q. You know the defendant, William Broddy. A. Yes; I know him well. Q. Was he living in Brampton during the lifetime of Mr. Coyne? A. Yes; and he has been living here since Mr. Coyne's death; he was bailiff of the Division Court occasionally; and I think he was general agent for everybody, for everything nearly; to a great extent handling money for different people; he did general business for a great many people, a money business, the collection and investing of money. Q. Do you remember whether he was concerned in any way with the winding up of the affairs of the estate of the late Mr. Coyne? A. He had a great deal to do with it, just how much I cannot say; I am not sure whether he was executor or not, but I think not; I think it was my brother and Mr. Chauncey were the executors; but Mr. Broddy interested himself a great deal, and helped Mrs. Coyne to get matters, not very straight, settled up as speedily as possible. Q. Can you tell what active part he took in reference to the sale of this property? A. Speaking from memory, the property was willed to Mrs. Coyne, everything willed to her, and there were creditors to a large amount; Mr. Broddy took some part—I think a pretty active part—to get them to release their claims to her, or rather assign their claims to her; he took the principal part, or at least assisted to some extent in having that arrangement carried out; and he also made some other business arrangements for her which were not strictly connected with this sale; for instance, as to the business and books of the office, he made arrangements with Mr. Beynon to transfer the books to him for a consideration; he carried out that arrangement for Mrs. Coyne; he acted as auctioneer at the sale of the furniture—but whether on his own behalf or on behalf of the executors I cannot say; I think he was selling for Mrs. Coyne, but I cannot say positive. Q. You are aware that the creditors released to Mrs. Coyne their claims against the estate? A. They were generally released, I think; one or two small claims had to be attended to in some way; the result was a release of all claims; I know that Mr. Broddy acted in that way, so as to get all that was possible out of the estate for Mrs. Coyne. Q. In reference to the sale of the house property, after the furniture was sold, can you tell of yourself how that was carried out by Mr. Broddy? A. I cannot; the buyer was Mr. James Fletcher; Mr. Broddy was concerned

in the matter, but to what extent I cannot say; I had nothing to do with that; speaking from memory, the property was sold subject to a mortgage of \$2,000 and interest on it, and Mr. Fletcher gave \$2,000 in addition, giving some other property for \$900, and his own notes for \$1,100; that is my recollection. Mr. Fletcher entered into possession of the property; he lived in it for some time. Q. Do you know who held the notes taken from Mr. Fletcher, for \$1,100? A. I held \$900 of them; at least I had them in my possession; I received them from Mrs. Coyne. Q. How long did you hold them? A. Well, I held them until the two notes were collected; I recollect \$400 of the \$900, but I have positive recollection of \$600 out of the \$1,100; the notes were payable at the rate of \$200 a year, year by year, leaving the last note to be paid \$100. Q. Was any security taken from Mr. Fletcher except these notes? A. Not for that; they were his own notes. Q. Who got the notes from you? A. Mr. Broddy. Q. Just state to the Court the circumstances of the delivery of the notes to Mr. Broddy? A. Well, it came the time when there were three notes still current; Mr. Fletcher had sold the property, and they were not looked upon as good security as they had been, and Mr. Broddy asked me about them; one morning, coming down street, he asked me if Jim Fletcher had paid those notes of Mrs. Coyne's, if they were all paid yet or not; I said no, they were not paid, and I told him how they stood; of course I cannot recollect the words I used to him. He then said he thought he could attend to that; he thought he had better have the matter put in some better shape; I said it would be better. He said then he was arranging a loan to Mr. Fletcher, from Mr. Beattie, for \$1,000, and if I would give him the notes he thought he could save them for the widow and orphans out of that money; it was a loan from Mr. Beattie to Mr. Fletcher on this same property; and that was nearly all there was about it; I did not then hand the notes to him, but in a day or two afterwards I handed Mr. Broddy the notes. * * Q. Do you recollect Mr. Broddy telling you anything about it afterwards? A. Well, he told me he had got that matter fixed; I did not enquire much about it, because I thought handing them to him was about the same as handing them to Mrs. Coyne. Q. Did you know from him that the transaction had been carried through? A. I understood from him, but I cannot say when and where he informed me; I just understood from

him he had carried the thing through, and that he had saved the money for her.

There was some evidence of a payment of \$25 by cheque to the plaintiff in 1884, but a cheque was put in for that amount which bore the word "loan" on its face.

Laidlaw, Q.C.—I submit that Mr. Broddy was trustee for this plaintiff, and that the Statute of Limitations is not applicable. I refer your Lordship to the case of *Cook v. Grant*, 32 C. P. 511.

CAMERON, C. J., C. P. D.—I am of opinion the defendant Broddy received the notes from Mr. Scott, as the agent of of the plaintiff, for the purpose of deducting the amount of the notes from the money that was to come into his hands as the agent of the plaintiff, for the plaintiff; that the money was so received on or about the 10th of February, 1877; and that the Statute of Limitations works a bar, unless there has been a subsequent acknowledgment in writing, or payment, to take it out of the statute. There was one payment of fifty dollars, which was made more than seven years before the commencement of the action, and that cannot operate; and the other payment, that is earlier, is made by means of a cheque which, on the face of it, appears to be a loan—the word "loan" being written on it—and is not, therefore, a payment in terms as acknowledged by the defendant Broddy. I am, therefore, of opinion, the statute applies to bar the claim. I am of opinion there was no express trust; the only trust was that which arose from the relation of principal and agent, and that relation does not, in my judgment, prevent the operation of the statute. I have some difficulty in determining in this case what ought to be done in reference to the defendant Broddy. The Statute of Limitations is not pleaded on his behalf but it is before the Court and if he must be assumed to be before the Court I do not think I am justified, after hearing that Mr. Broddy is in such a condition that he is not able to defend himself, or to give any explanations, in awarding judgment against him. I should have had considerable difficulty in determining what ought to be done if the judgment were to stand against him in favour of the plaintiff, because if it were to stand it would be in respect to an existing debt before this assignment, and it would be difficult to say

the plaintiff ought not to share in the estate; but I do not think an admission, either by confession of judgment, by writing, or by word, on the part of the defendant Broddy after the assignment was made, could affect the property in the hands of the trustees, and they would be justified in setting up the Statute of Limitations. I, therefore, enter this formal judgment on the pleadings—I do not say anything in reference to the objections to the pleadings; if there is you ought to have replied that the money was paid; but it is not on that ground I decide, because I would allow the pleadings to be amended. The case is in the Chancery Division, where you will get this doctrine of trust fully considered. I will direct judgment not to be entered until after the sitting of the Divisional Court. I would allow an amendment of the replication, if the Court are of opinion at all it was a proper payment; but I think the authorities are very strong it was not. I would much rather give judgment in favour of the plaintiff, if I could.

Judgment entered on the pleadings.—I find that the defendant, William Broddy, received the notes in the third paragraph of the plaintiff's statement of claim, for the purpose of deducting the amount thereof from certain money coming into his hands on account of the maker of the said notes, and subsequently received the amount of the said notes out of the said money, for the plaintiff, on or about the 10th day of February, 1877; that in so receiving said money he was acting as the agent of the plaintiff. I find that the said money was received more than six years before the commencement of this action, and was received without any express or other trust than that arising from the relationship of principal and agent. I am, therefore, of opinion that the plaintiff's right of action is barred by the Statute of Limitations, and I dismiss the plaintiff's action with costs, but judgment is not to be entered until the fourth day of the next sittings of the Divisional Court of Chancery.

From this judgment the plaintiff appealed, and the appeal was argued before the Divisional Court on December 2, 1886, before Boyd, C., and Proudfoot J.

Bain, Q. C., for the appeal. The question to be decided is: Was Broddy a trustee for the plaintiff, and if so, can

he or his assignees plead the Statute of Limitations as a bar to the plaintiff's claim? The evidence shews Broddy had acted on the plaintiff's behalf in the negotiations with creditors which resulted in the house property being sold to Fletcher, and of which the notes delivered to Broddy formed part of the purchase money, being secured to her. His connection with the original transaction led him to enquire whether the notes had been paid, and his offer to receive possession of them with the view of endeavoring to protect the interest of the plaintiff and her children. The notes were delivered to him and received by him as the property of the plaintiff, and he held them on the express understanding that he was to hold them for her. Suppose a piece of plate had been placed in his hands on the understanding that he would hold it for a particular purpose, would he not have been an express trustee? [BOYD, C.—But here the notes were given to him to collect.] They were given in order, as he himself expressed it, "to save the money for the widow and the orphans." He was not employed merely as an agent to collect. The mortgage money was being borrowed through him and was to pass through his hands. It was borrowed upon property upon which the plaintiff then held a vendor's lien for the amount of these notes. All the notes had not then matured, but it is clear the plaintiff could have intervened and prevented the mortgage transaction being completed unless her interests were protected. Having the notes in his hands it was his duty as trustee to protect the plaintiff's interests by retaining such portion of the money as was necessary to satisfy her claim. He did this, and this was the only collection made by him. If a trustee to hold the notes until the money was paid, he was equally a trustee of the money when he received it, and neither he or his assigns can plead the statute as a defence in an action to recover the amounts: *Cook v. Grant*, 32 C. P. 511; *James v. Holmes*, 4 D. F. & J. 470; *McFadden v. Jenkins*, 2 Ph. 153. In *Pink v. Elliott*, 17 C. L. J. 168, it was held where a principal delivered to his agent a sum of money to pay a

particular debt that sum formed a trust fund in the hands of the agent, and a fiduciary relationship existed between the parties. Broddy received and held the notes and the money for a particular purpose, and on a direct promise, and this made him an express trustee: *Cook v. Grant*, per Osler, J., at 521. [BOYD, C.—But in this case as soon as the money was collected Mrs. Coyne could have gone and got it. There was nothing to shew that Broddy was to hold it after collection for her.] His duty was to have paid the money at once when he received it. His holding it over did not alter his position. He had no right to retain it and use it for his own purposes. I refer also to *Burdick v. Garrick*, L. R. 5 Ch. 233; *Foley v. Hill*, 2 H. L. C. 228; *Darby's Statute of Limitations*, p. 184.

J. H. Macdonald, Q. C., contra. The evidence shews Broddy collected the money; that was all he had to do. There is no evidence of any request by either Mr. Scott or Mrs. Coyne that Broddy should hold the money. The payment in 1884 was a loan, as the cheque shews. The authorities all shew there must be an *express* trust. An *express* trust is a trust which is clearly expressed by the author thereof, whether verbally or by writing: *Snell's Equity*, 2nd ed., 48. I also refer to *Banning's Limitations of Actions*, 187; *Re Hindmarsh*, 1 Dr. & S. 129. In *Burdick v. Garrick*, *supra*, there was an express trust and a continuous act; a trust to invest the money when received. In *Cook v. Grant*, *supra*, there was an agent to hold, which was not the case here. *Burdick v. Garrick*, and *Re Hindmarsh*, are considered by Hall, V. C., in *Watson v. Woodman*, L. R. 29 Eq., p. 731. There must be a trustee and an estate, or interest vested in the trustee to create an express trust; *Dickenson v. Teasdale*, 1 D. J. & S. 52. See also *Bannor v. Berridge*, 18 Ch. D. 254, and *Beckford v. Wade*, 17 Ves. 86.

Bain, Q. C., in reply. Broddy was in a fiduciary relationship before he got the notes, and that continued. If he received as a trustee, he held as a trustee.

January 8, 1887. **BOYD, C.**—The defendant Broddy is a bailiff and an agent for collecting money, and was employed by the executors and creditors to wind up the estate of the late Mr. Coyne for the benefit of his widow, the plaintiff. This was some ten years ago. In connection with this the house property was sold, and Mr. Fletcher purchased, giving notes in part payment. These notes were payable to Mrs. Coyne, and were received by her. She afterwards gave them to a relative, Mr. Scott, who was examined, and he held them for her. More than a year after this transaction was thus closed, the notes were given to Broddy under circumstances detailed in Mr. Scott's evidence, and he procured the money for them, of which the plaintiff was notified soon after. This dealing occurred in 1877. There was no payment or acknowledgment by Broddy thereafter; he assigned to trustees for the benefit of his creditors early last year. They are defendants and plead the Statute of Limitations. He is also a defendant, and it said is now in a state of imbecility or other incapacity so as not to be able to give evidence. The question arises: Is the claim of such a fiduciary character that the defendants cannot set up the statute as a bar?

The evidence is not to be overpressed against the defendants both by reason of the lapse of time since the original transaction, and because of the inability of Broddy now to testify. Giving full effect to all that is stated by Mr. Scott, it amounts to no more than this: it was supposed that the Fletcher notes were not likely to be paid, and as money on a loan procured by Fletcher was passing through Broddy's hands he undertook to endeavour to save these notes out of that money for the widow and orphans, and he succeeded in doing this, *i. e.*, getting the money for the notes, which result was forthwith communicated to Mr. Scott, from whom the defendant had received the notes. The engagement of Broddy did not go further than this. He did not undertake to *hold* that money when received for her, or to employ it for her advantage. No doubt his duty and the implied obligation was to pay it over to her

within a reasonable time. But failing to do this, what redress was open to her? He was unquestionably in a fiduciary position as to her and this money, but to what extent? The case must be dealt with subject to the provisions of the Judicature Act, of which sec. 17, sub-sec. 2, enacts that "no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." This is said to be but a statutory declaration of a law which had always been recognised and administered in Courts of Equity: *Re Cross, Harston v. Tenison*, 20 Ch. D. 121, and it has been held to extend to personalty: *Banner v. Berridge*, 18 Ch. D. 262.

The Act is dealing with *express* trusts and Lord Westbury's definition of an "*express trust*" is most important in seeking to ascertain the scope of the provision. Referring to 3 & 4 William IV. c. 27, s. 25, he said: "The words express trust are used by way of opposition to trusts arising by implication, trusts resulting, or trusts by operation of law. Two things must combine here; there must be a trustee with an express trust, and an estate or interest in lands vested in the trustee, and which, therefore, the trust must affect. The subject matter of the trust is to be dealt with in conformity with the trust": *Dickenson v. Teasdale*, 1 D. J. & Sm. 59. To the like effect is the language of Fry, J., in *Sands v. Thompson*, 22 Ch. D. 614, 617: "My notion of an express trust is that it is a trust which has been expressed, either in writing or by word of mouth, and that it does not include a trust which arises from the acts of the parties. The term does not apply, in my judgment, to a resulting trust, to an implied trust, or to a constructive trust."

In *Banner v. Berridge*, 18 Ch. D. 263 (not cited in *Sands v. Thompson*), Mr. Justice Kay pushes the definition to perhaps its utmost limit when following the view of Lord Hatherley in *Burdick v. Garrick*, L. R. 5 Ch. 233, 239, he says that a man may be bound by an express trust where money which in no sense

belong to him, and in which he has no kind of interest, or goods, plate, or jewels are placed in his hands by the real owner, as depositor of them, and that without any writing or even expression in words that it was to be a trust. This last deposition must be limited to cases of deposit for safe keeping, or the like continuing duty, in which the trust cannot be discharged until the property is handed over to some one entitled to receive it.

That was the special case dealt with in *Burdick v. Garrick*, L. R. 5 Ch. 240. See also judgment of Giffard, L. J.

But what was precisely the express trust here? No more than this, to take the notes, get the money for them, if possible, and that for the benefit of the plaintiff. Anything beyond this is implication. The proper inference from the circumstances would be that Broddy undertook not to hold for safe custody as a depositor, nor for investment as a scrivener, but subject to the immediate payment of the proceeds of the notes, when received, to the principal, as an attorney or agent to collect and remit. This involves the establishment of a fiduciary relationship, but not that of trustee and *cestui que trust* to all intents.

In *Re West of England and South Wales District Bank, Ex p. Dale*, 11 Ch. D. 778, Fry, J., dealing with the question what is a fiduciary relationship, thus answers: "It is one in respect of which, if a wrong arises, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of a *cestui que trust*. If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists, and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed and separated from any money of their own."

The precise fiduciary standing of a financial agent, such as the defendant, is very clearly exhibited in *Foley v. Hill*, 2 H. L. C. 28. There the distinction is drawn between a banker and a factor or agent. Money when paid into a bank ceases altogether to be the money of the principal

and becomes the banker's money for which he is accountable. But a factor, partaking of the character of a trustee, as the trustee for the particular matter in which he is employed as factor, sells the principal's goods and accounts to him for the money. The goods remain the goods of the owner or principal till the sale takes place, and the moment the money is received the money remains the property of the principal. So it is with an agent dealing with any property; he obtains no interest himself in the subject matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged. These citations are from the judgment of Lord Cottenham.

The banker is held to be merely a debtor as contrasted with the factor or agent who is a debtor with a *fiduciary* character added. These observations were addressed to the question as to whether or not the plaintiff had a right to come into equity at all, and it was held that as there was no fiduciary relationship there was no jurisdiction. But the Law Lords abstain from considering what would be the effect of the Statute of Limitations pleaded to such claim if it had been of equitable cognizance (pp. 41, 42.) That is the point which arises for determination in this case.

This point was adverted to by Lord Hatherley, in *Burdick v. Garrick*, L. R. 5 Ch. 240: "I do not say that in every case in which a bill might be filed against an agent the Statute of Limitations would not apply, but in all cases where the bill is filed against an agent on the ground of his being in a fiduciary relation, I think it would be right to say that the statute has no application." He exemplifies by referring to the case of a person holding funds for a particular purpose, and having the duty cast upon him of holding them for the benefit of the person who intrusted him with them.

Giffard, L. J., analyzes the circumstances of the transaction before them, and holds that there was a confidence reposed in the agents on the one hand, and a duty thereupon cast upon them on the other. There was a special power of attorney under which they were authorized to receive and invest, to buy real estate, and otherwise to deal with the property; but under no circumstances could the money be called theirs; under no circumstances had they the least right to apply the money to their own use, or to keep it otherwise than in a distinct and separate account. Through the whole time that the agency lasted, the money was the money of the principal, and not in any sense theirs. He then generalizes by saying that "where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over the property to somebody entitled to it." p. 243.

Lord Hatherley refers to the early cases in which the simple appointment of an agent with confidence reposed in him seems to have been held sufficient by the Court of Chancery to prevent the Statute of Limitations taking effect. These are *Sheldon v. Weldman*, 1 Ch. Ca. 26; *Lord Hollis Ca.* 2 Vent. 345; *Heath v. Henly*, 1 Ch. Ca. 20.

Now here the notes when handed to Broddy were to be by him converted into money, and that money to be accounted for and paid over to Mrs. Coyne forthwith. He had no right to detain, much less to misappropriate the proceeds for his own purposes. He had probably the right to deposit what he obtained to his own account in the bank, if he promptly notified Mrs. Coyne of his success and proceeded to remit to her an equivalent sum. It was not trust money in such a sense that he would commit a breach of trust in merely carrying it to his own private account. In *Ex p. Dale*, 11 Ch. D. 775, a banking company was employed as agent to collect money and remit to their employer. Fry, J., said, "the agent receiving these average orders was bound to convert them, so

to speak, into money, *i.e.*, was bound to receive the money for which the orders were given, and he might with propriety place the money in his till, provided he directed his agents to credit D. & Co. with the amount so received."

In another case there was an agent or broker into whose hands stock was put to be realized and the proceeds applied in a particular way, and of him Baggallay, J. A., remarked: "I am not prepared to say that his paying the money into his account at the bank was necessarily a breach of trust, but the money paid in remained trust money, and if it can be traced, it can be followed." *Ex p. Cooke, In re Strachan*, 4 Ch. D. 127.

The breach of trust would arise on the defendant's part when he failed to remit and kept the money an unreasonable time, which indicated his intention to convert it to his own use. From the time that was or might have been known to Mrs. Coyne his trust character ceased, and the parties were at arm's length. She had no reason to trust him any longer, or to believe that he was holding the money for her. Nothing occurred or was said to create any continuing trust as to this fund, and the retention of it by the defendant was "an adverse possession," to use the apt phrase employed by Stuart, V. C., in *Teed v. Beere*, 5 Jur. N. S. 381. He informed her agent at the outset that he had collected the money, but he did not undertake to hold it for her, and never otherwise recognized any responsibility for it by paying interest or giving any acknowledgement.

It then became the duty of Mrs. Coyne to make him pay, not as a trustee, but as a debtor; and if she failed to resort to the usual remedy till after six years from his default, he has the right to plead the statute as a bar to the recovery of this claim. If the fund itself could be traced, the fiduciary character would attach to that so that the statute would not avail the present defendants, as was intimated by Romilly, M. R., in *Harcourt v. White*, 28 Beav. 308; but where personal relief is sought in an action

for money had and received like this, law and equity both concur in refusing to enforce stale claims: *Beckford v. Wade*, 17 Ves. 99, 100; *Scott v. Jones*, 4 Cl. & Fin. 395, per Lord Brougham.

The particular point I am now dealing with is very well put by Rolfe, B., in *Pardoe v. Price*, 16 M. & W. 458: "It is quite clear that so long as no other relation subsists between two parties except that of trustee and *cestui que trust*, no action can be maintained by the latter against the former for any money in his hands. The trustee is, in such case, the only person entitled at law to the money, and the remedy of the *cestui que trust* is exclusively in a Court of Equity. When, indeed, there is no trust to execute, except that of paying over money to the *cestui que trust*, the trustee, by his conduct, as for instance, by admission that he has money to be paid over, or by settling accounts on that footing, may, and often does, make himself liable to an action at law at the suit of the *cestui que trust* for money had and received, or for money due on accounts stated."

This passage was referred to by Lord Campbell, in *Edwards v. Lowndes*, 1 E. & B. 89, and he thus proceeded: "If, indeed, the trustee, by appropriating a sum as payable to the *cestui que trust*, or otherwise, admits that he holds it to be paid to the *cestui que trust* and for his use, the character of the relation between the parties is changed; and the trustee does not hold it as a trustee properly so called, but as a receiver for the plaintiff's use, who may maintain an action at law for money had and received founded upon the appropriation to his use and the liability thence arising."

In re Kelly, 11 Ch. D. 311, James, L.J., deals thus with the point: "If a trustee commits a breach of trust, by stealing or otherwise misappropriating the trust moneys, he becomes a debtor to his *cestui que trust* in respect of the money which he has thus improperly taken; and if he becomes a debtor in that way, he remains only a debtor, and the *cestui que trust* only a creditor, unless he can

‘ear-mark’ the money which the trustee has misappropriated.”

The precise position of Broddy is indicated in the language of Bramwell, J.A., in *Ex p. Cook*, 4 Ch. D. 128 : “The money was paid to him, not as a trustee in the strict sense of the word (so that no action at law could be maintained against him, and he would only be liable to have a bill filed against him), but was handed to him in a fiduciary character, so as not to create the mere relation of debtor and creditor between him and his principal.” But it appears to me that the moment his conduct indicated that he appropriated or did not mean to hold that money for his principal the trust character became subordinate to that of an ordinary debtor, except in so far as the fund itself could be followed and ear-marked. At that point two remedies were open to the plaintiff; she could treat him as a debtor for the amount and sue him for money had and received to her use; or she could proceed to recover the particular moneys received by him so long as they were traceable and no holder for value without notice intervened. It may be that the Court would not give effect to the Statute of Limitations so long as the fund was susceptible of specific identification. But that would not be the case in the other aspect of his liability. If he is merely a debtor and the plaintiff merely a creditor, in the action for an equivalent as money had and received, the statute is a good defence.

When a breach of trust as to money held for a specific purpose is committed, and is known to the beneficiary, the relation of debtor and creditor arises and a cause of action then accrues which may be barred by the Statute of Limitations. This case presents a distinct and isolated transaction, not therefore involving a series of acts and duties as to which fiduciary relations might exist till the relation was closed. The one receipt of money was for the plaintiff’s sole use. There was no evidence of any continuing express agency after the money, the proceeds of the notes, was received. No statements were made to mislead the plaintiff, or lull

her into security. She was told of the collection of the money for her, and took no steps to lay claim thereto till the statutory limit had run its course. The defendant did not hold himself out by his conduct as trustee: he paid no interest and in no way recognized her rights: *Craig v. Watson*, 8 Beav. 433.

It is difficult to distinguish the defendant's position from that of the defendant in *Komon v. Hayward*, 2 A. & E. 666, where he received a sum for the plaintiff, and had given the plaintiff a writing saying that that he held so much money for the plaintiff "to put into a savings bank for her." This was not done, and in an action on the common counts the objection was raised that it was a trust and it could not be sued at law. This was overruled by the Court. Littledale, J., said, p. 669: "After signing the memorandum, the defendant cannot say he held as trustee. It is not at all like the case of a trust of which equity will alone take cognizance; he undertakes to put the money which he receives for the party into the bank."

The Court of Appeal in Ireland have taken a similar view in a case of *Crawford v. Crawford*, 16 W. R. 411, which I had occasion to refer to when I was considering a question somewhat analogous to the present in *Kirkpatrick v. Stevenson*, 3 O. R. 361. The opinion expressed by Littledale, J., is also one in conformity with the conclusions of Kent, C., and serves to mark the line of division between cases in which the Statute of Limitations is and is not a defence in cases of trust. In *Kane v. Bloodgood*, 7 John's Ch. R. (N. Y.) 90, that eminent jurist laid it down, after a most elaborate investigation of authorities, that those trusts which are mere creatures of equity, and not within the cognizance of a Court of Law, are not within the Statute of Limitations. As long as there is a continuing and subsisting trust acknowledged or acted on by the parties, the statute does not apply; but even in such cases if the trustee denies the right of his *cestui que trust*, and the possession of the property becomes adverse, lapse of time from that period may constitute a bar in

equity. Other trusts, however, which are the ground of an action at law are not exempted from the operation of the statute. This exposition of the law has been widely accepted in the States as correct: *Finney v. Cochran*, 1 Watt. & Serg. (Pa.) 112; *White v. White* 1 Maryland, Chy. Dec. 56. See also *Murray v. Coster*, 20 John Rep. 576. The early cases referred to by Lord Hatherley were criticized and their value set aside as governing the more modern law of trusts in this masterly judgment. See also upon the general proposition that the older precedents in equity are of comparatively little value, the language of Jessel, Master of the Rolls, in *Re Hallett's Estate*, 13 Ch. D. 710.

The modern doctrine of following the proceeds of property held or acquired in a fiduciary character is fixed by the leading case of *Re Hallett's Estate*, just cited. But it is not questioned by the Master of the Rolls, that the law is, as set forth in the cases cited by him: *Ryall v. Rolle, Ex p. Dimes*, and *Scott v. Surman*, that if the proceeds cannot be followed, the principal can only come in as a creditor, and if so, such a claim is one that may be barred by the statute; notwithstanding it originated by virtue of a fiduciary relationship. *Bailey v. Jellett*, 9 A. R. 187 recognizes the distinction I seek to make between following the proceeds in a proper case, and the common law litigation of debtor and creditor. (See beginning of judgment of Spragge, C.J.O.)

The judgment of Lord Westbury (with whom agreed the majority of the Lords) in *Knox v. Gye*, L. R. 5 H. L. 656, follows in much the same lines as that of Kent, C., in *Kane v. Bloodgood*, and both Judges regard *Lockey v. Lockey, Finch's* Precedents, 518, as laying down correctly the general principle. Much of Lord Westbury's language is applicable to the argument in this case, but I quote only one passage in which he says, p. 676, "The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words a complete trustee—holding the property exclusively

for the benefit of the *cestui que trust*, well illustrates the remarks made by Lord Mansfield that nothing in law is so apt to mislead as a metaphor."

Substantially the case in hand is not different from the position of a solicitor who receives notes and securities to be collected for his client. In such a case, the moneys he collects are recoverable in a legal action, to which, if not prosecuted within six years, the statute is a bar: *Ex p. Hindmarsh*, 1 Dr. & S. 129; *Crawford v. Crawford*, 16 W. R. 411; *Watson v. Woodman*, L. R. 20 Eq. 728; *Stafford v. Richardson*, 15 Wend 302; *Jett v. Hempstead*, 25 Ark. 462.

Cook v. Grant, 32 C. P. 511, does not conflict with my conclusion. The evidence there shewed that the money was taken by the deceased William Grant on an express promise to hold it for the plaintiff until his death, or till she sooner desire it to be paid to her. He was the custodian of the money for her, and his possession was as her agent by the very terms of the arrangement. Such is not the evidence in this case, and that in the opinion of the same Judge, Cameron, C. J., who presided at the trial of *Cook v. Grant*.

The judgment dismissing the action should be affirmed, with costs.

I have not seen the pleadings—if the defendant Broddy sets up the statute as a defence, he is entitled to the benefit of it on the evidence; if there is no defence entered by him, judgment should go against him as by default without prejudice to that being moved against if it is made to appear that he was not competent to defend.

PROUDFOOT, J.—John Coyne died about the year 1874, having made a will by which he gave everything to his wife, and appointed executors who seem to have done nothing or had little to do, for Mrs. Coyne appears to have taken the active steps in winding up the estate. The testator left debts to a large amount, and steps were taken to get them to release or compound for their claims. In this business Mrs. Coyne, the present plaintiff, had the

assistance of the defendant Broddy, who seems to have been an active bustling man and had the confidence of every one, and by his means the creditors were satisfied or appeased.

It was found necessary, however, to sell the house and property in Brampton, and Fletcher became the purchaser. For part of the price he gave several promissory notes, payable at intervals of a year. In this transaction the defendant Broddy acted for the plaintiff. The notes amounted to \$900.

After two of the notes had been paid, Fletcher was, through Broddy, negotiating a loan for \$1,000 from one Beatty, for the purpose of paying a note he owed to one Henry for \$300 and interest. While this was in progress Broddy asked Judge Scott, a brother of the plaintiff, and in whose hands the notes were, if Fletcher had paid the notes to the plaintiff. Mr. Scott told them how they stood. Broddy then said he thought he could attend to that; he thought he had better have the matter put in some better shape. He said he was arranging a loan to Fletcher from Beatty for \$1,000, and if Mr. Scott would give him the notes he thought he could save them for the widow and orphans out of that money. In a day or two afterwards the notes were given by Mr. Scott to Broddy. This was in the early part of 1877, and on the 10th February in that year Broddy received the money for the notes, and has never paid it.

It was not shewn that there was any acknowledgement sufficient to prevent the operation of the Statute of Limitations; and the single question is whether Broddy held these notes upon an express trust for the plaintiff; when the statute would have no application. O. J. A. s. 17, ss. 2.

A trust of personal property may be created by parol: *Cook v. Grant*, 32 C. P. 511.

To constitute a trust there must be confidence reposed in the trustee for the performance of a particular act or acts for the benefit of the *cestui que trust*.

I lay aside the cases in which solicitors have been held not to be trustees, although in many respects their character is similar; but a peculiar course of decision has been observed with respect to them which is not observed with respect to others who do not fill that character. Thus, in *In re Hindmarsh*, 1 Dr. & S. 129, Kindersley, V. C., held that the Statute of Limitations applied as between a solicitor and his client. He says, p. 132: "It is insisted that a solicitor generally stands, in a certain sense, in a fiduciary character towards his client, so that there is a sort of relation of trustee and *cestui que trust* between them, and that, as between a trustee and *cestui que trust*, the statute does not apply; and it is contended that for that reason it does not apply in this case. But I do not think that any such character of trustee and *cestui que trust* existed in this case as will exclude the application of the statute. It appears that Addinell became the client of Hindmarsh and Evans, and that these moneys were received by them in winding up the estate of John Addinell in the ordinary character of agents, and whether they were the solicitors of the petitioner or not, does not affect the question, and does not constitute the relation of trustee and *cestui que trust*, or place the parties in any other position than that of ordinary principals and agents."

In *Burdick v. Garrick*, L. R. 5 Ch. 233, Lord Hatherley, does not seem to have been satisfied with that case; he says, p. 240, it depends upon the special facts disclosed in report, "and in my opinion the demurrer (decision?) could not be justified if it had been a simple case of a person holding funds expressly for a particular purpose, and having the duty cast upon him of holding them for the benefit of the person who intrusted him with them. In such a case of agency I apprehend it could not be said that the Statute of Limitations was applicable. I do not say that in every case in which a bill might be filed against an agent the Statute of Limitations would not apply, but in all cases where the bill is filed against an agent on the ground of his being in a fiduciary relation, I think it would be right

to say that the statute has no application." [The same learned Judge says again, p. 239: "In the early cases cited by Mr. Hanson in his very able argument, a simple appointment of an agent with confidence reposed in him, seems to have been held sufficient by this Court to prevent the Statute of Limitations taking effect. It would indeed be a strange thing if this Court should be obliged to hold that if a person, for instance, were to deposit plate or jewels with his bankers, intending to be absent from home for a number of years, and those chattels were converted by his bankers to their own use in fraud of the owner, and the owner were to come back after the end of seven or eight years, he is utterly remediless either in the shape of an action at law, or of a suit in this Court, because the dealing with his property has been in the nature of an agency." The learned Judge then distinguishes the position of a mere banker as defined in *Foley v. Hill*, 2 H. L. C. 35.

The same subject was discussed by Kay, J., in *Banner v. Berridge*, 18 Ch. D. 254, where after discussing the definition of an express trust as given by Kindersley, V.C., in *Petre v. Petre*, 1 Drew. 371, and by Lord Hatherley in the case just cited of *Burdick v. Garrick*, he says that *Burdick v. Garrick* "obviously enlarges the definition which Vice-Chancellor Kindersley gave, and points out that a man may be bound by an express trust when moneys, which in no sense belong to him, and in which he has no kind of interest, or goods, plate, or jewels are placed in his hands by the real owner as deposittee of them, and that without any writing or even expression in words that it was to be a trust. That would come, according to Lord Hatherley's dictum here, within the definition of express trust, and that seems extremely reasonable."

In these cases it will be noticed that the money or other chattel deposited was not to become the property of the deposittee, and that the character of a trust being once impressed upon it was not divested because it had been wrongfully converted; it continued upon it until it or its equivalent reached its destination, and that it was not neces-

sary to ear-mark the thing deposited, or to trace the produce of it into other property upon which the trust might attach.

In the present case there can be no question that a trust attached upon the notes given to Broddy; they were not to become his property; a special confidence was reposed in him to secure their payment out of an entirely distinct transaction with another person and to save them for the widow and orphans; and, indeed, it was hardly contended that there was not a trust at first, but it was said that it ended when the money was collected, and then that it became a simple debt and was barred by the statute. I am unable to agree with that argument.

The deposit and the undertaking was an entire single transaction, and if a trust once attached it continued until the completion of it by the money being placed in the widow's hands. And as a further evidence of the special nature of the duty undertaken by Broddy it is to be noticed that the notes were not due when confided to him. His was not a mere agency to collect, but he was to exercise an influence for the purpose of getting better security, or anticipated payment.

There is much more reason for holding this to be a trust than in the case put by Lord Hatherley, a simple case of a person holding funds expressly for a particular purpose, and having the duty cast upon him of holding them for the benefit of the person who intrusted him with them; and we have the opinion of that great master of Equity that to such a state of circumstances the Statute of Limitations is not applicable. For in the present there was not such a simple case, but Broddy had active exertions to make and duties to perform, besides being a simple deposittee.

The case of a banker, in regard to money deposited in an ordinary bank account is different, for there the money becomes his, he is entitled to deal with it, to invest it, to make a profit in which the customer does not share, and is only bound to return an equivalent. He is a simple

debtor for the amount of the deposit: *Foley v. Hill*, 2 H. L. C. 28, 35.

Upon principles such as I have pointed out, our Court of Common Pleas acted in the case of *Cook v. Grant*, 32 C. P. 511. The plaintiff had given meritorious services to her uncle Samuel Grant, and a few days before his death Samuel and his brother William Grant had a conversation in which Samuel asked William if \$800 would pay the plaintiff for the trouble of taking care of him (Samuel). William said it was enough because he intended to give the plaintiff \$500 or \$800 himself. William had money of Samuel's in his hands at that time, and the arrangement with Samuel was that he was to pay the \$800 to the plaintiff when she needed it, or she was to get it at William's death. The judgment of the Court was delivered by Osler, J., who says, at p. 521: "It is not necessary, as the defendant contended, that such a trust should be evidenced by writing to prevent the operation of the statute, and I think it clear upon the evidence that William Grant held this money as trustee upon an express trust for the plaintiff. He was not merely a legal debtor to the plaintiff in respect of it. He had been entrusted with it for her. As he himself expressed it, he was taking charge of it for her. He had received and was holding it expressly for a particular purpose, namely, for her benefit, and nothing more was wanting to place him in a *fiduciary* position towards her in respect of it."

There was no duty of investing the trust money, no ear-marking of the money, no active duty in respect of it, and no question of following it into any investment. It was the simple case of money left in William's hands for the benefit of the plaintiff. The expression made use of by William that "he had the money himself keeping it for Maggie," the plaintiff, is no stronger indication of a trust than Broddy saying if he got the notes "he thought he could save something for the widow and orphans." The original character of the trust remained, and the Statute of Limitations was held to be no bar.

In *Burdick v. Garrick*, L. R. 5 Ch. 233, the language I have quoted above was not perhaps strictly necessary for the decision of the case, as the agent there was intrusted with the funds for investment which made it more clearly a case of trust, but the learned Chancellor does not say that if the agent had been intrusted with funds for the purpose of being remitted, when received, to the principal, he might have pleaded the statute.

We were also referred to *Re Kirkpatrick; Kirkpatrick v. Stevenson*, 3 O. R. 361, decided by the Chancellor, but the Chancellor distinguishes it from *Burdick v. Garrick*, as in the case before him the acting executor came lawfully and rightfully into the possession of the assets, of which one half also belonged to him in his own right as one of the residuary legatees, and by the arrangement he was discharged upon remitting an equivalent for one half of the moneys received by him, and there was no breach of trust in his dealing with the moneys and using them for his own purposes, subject to his accounting and allowing interest for any default or delay in the payment at the proper periods. The case of *Crawford v. Crawford*, 16 W. R. 412, cited by the Chancellor in *Kirkpatrick v. Stevenson*, *supra*, was not a case of trust at all. "If I hand a sum of money to A. B. and tell him to pay it to C. D., and he promises to do so, and afterwards keeps the money an unreasonable time, the matter is simply a breach of contract." C. D. was not a party to the arrangement, and A. B. did not promise to hold it in trust for him, and he did not of course promise to hold it in trust for the person who entrusted him with it; that would clearly not be a case of trust unless every contract or promise is to be considered a trust.

The defendant Broddy, at the time of the trial, appears to have been of unsound mind and unable to give testimony or to be of assistance to either party. It does not appear when he became in that condition. But the case does not turn upon any admissions made by him, but is established by independent testimony. The assignees can

be in no better position than Broddy, and I apprehend he need not have been made a party to the action. However, considering that he is only a formal party, there would seem to be no objection to a judgment being entered against him as well as the others.

I think the judgment should be for the plaintiff.

G. A. B.

[QUEEN'S BENCH DIVISION.]

REGINA V. YOUNG.

Canada Temperance Act, 1878, sec. 103—Police magistrate—Jurisdiction.

The defendant was convicted at the town of Perth by the police magistrate for the south riding of the county of Lanark for selling, in the said town of Perth, intoxicating liquor contrary to the Canada Temperance Act, 1878. The authority of the police magistrate was derived from a commission appointing him for the south riding of Lanark as constituted for purposes of representation in the Legislative Assembly of Ontario. The same magistrate had been a few weeks previously by a separate commission appointed for the north riding of Lanark. The town of Perth was situated wholly within the said south riding.

Held, [ARMOUR, J., dissenting] that said magistrate was not a police magistrate for the town of Perth within the meaning of the 103rd section of the Canada Temperance Act, 1878, and that Perth could not not by virtue of the said commission appointing a police magistrate for the south riding of the county be held to be a town having a police magistrate.

Per ARMOUR, J., that Perth was under the circumstances a town having a police magistrate, and the said police magistrate had therefore in this case jurisdiction to convict.

THE defendant was, on the 9th of October, 1886, at the Town of Perth, in the County of Lanark, committed before James Alexander Allan, police magistrate in and for the said County of Lanark, for that he, between the 1st day of October, 1886, and the 5th day of October, 1886, at the Town of Perth, in the County of Lanark, being a place

wherein the second part of the Canada Temperance Act, 1878, then was and is in force, unlawfully did sell intoxicating liquor contrary to the Canada Temperance Act, 1878, Henry Stafford being the informant, and was adjudged for his said offence to forfeit and pay the sum of fifty dollars, to be paid and applied according to law, and also to pay the said Henry Stafford the sum of five dollars for his costs in that behalf, and if the said several sums were not paid forthwith, it was ordered that the same should be levied by distress and sale of the goods and chattels of the defendant, and in default of sufficient distress, the defendant was adjudged to be imprisoned in the common gaol of the said Town of Perth, in the said county, for the space of one month, unless the said several sums, and all costs and charges of the said distress, and of the commitment and conveying of the said defendant to the said gaol, should be sooner paid.

This conviction, together with the information, depositions, and evidence, was brought into this Court by writ of *certiorari*, dated the 18th day of December, 1886, and affidavits were filed that the said James Alexander Allan, the police magistrate before whom the said conviction was made, was not otherwise a police magistrate than under and by virtue of a certain commission, dated the 31st of August, 1886, appointing him police magistrate for the North Riding of the County of Lanark, as constituted for the purposes of representation in the Legislative Assembly of the Province of Ontario, and under and by virtue of a certain other commission, dated the 17th day of September, 1886, appointing him police magistrate for the South Riding of the County of Lanark, as constituted for the purpose of representation in the Legislative Assembly of the Province of Ontario, and that no police magistrate had ever been appointed for the Town of Perth, as distinct from the County of Lanark.

Upon these materials, on the 21st of January, 1887, *Aylesworth* obtained an order *nisi* calling upon the said

police magistrate and the said informant to shew cause why the said conviction should not be quashed, with costs to be paid by the said magistrate and the said informant, or one of them, to the defendant, upon the grounds following: (1) Upon the evidence given before the said police magistrate no offence against any of the provisions of the Canada Temperance Act, 1878, was shewn to have been committed; as there was no evidence whatever of any sale or barter of intoxicating liquor having taken place. (2) That the said James Alexander Allan had no jurisdiction to hear and determine the said prosecution or make the said conviction, inasmuch as the alleged offence, if committed at all, was committed within the county of Lanark, and the said county of Lanark was not a county having a police magistrate, wherefore the said prosecution could legally be brought before two justices of the peace, and not otherwise. (3) The said James Alexander Allan had no jurisdiction to hear and determine the said prosecution or make the said conviction, inasmuch as the alleged offence, if committed at all, was committed in the town of Perth, and the said town of Perth was a town not having a police magistrate, wherefore the said prosecution could legally be brought before the mayor of the said town or before two justices of the peace, and not otherwise.

On the 14th of February, 1887, *Delamere* shewed cause, and *Aylesworth* supported the order *nisi*.

March 11, 1887. WILSON, C. J.—The whole question turns upon the meaning of section 103 of the Temperance Act of 1878.

I have considered section 2 of that Act as to the meaning of the term *county*, and the R. S. O. ch. 72, and the 41 Vic. ch. 4, sec. 9, (O.), and the sub-sections of that section, and I do not think any of them affect the question before us on this motion.

Section 103 above mentioned is: "Such prosecution may be brought in the Province of Ontario before any (a) stipendiary magistrate; (b) or before any two other justices

of the peace for the county, city, or district wherein the offences were committed; (c) or, if the offence was committed in any county, city, or town having a police magistrate, then before such police magistrate, or, in his absence, then before the mayor or any two justices of the peace; (d) or, if the offence was committed in any city or town not having a police magistrate, then before the mayor thereof, or before any two justices of the peace."

In this case the offence was committed *in a town not having a police magistrate*, [and the offence was prosecuted before the police magistrate of the south riding of the county, in which south riding the town is situated.

I think it should have been before the mayor of the town, or before two justices of the peace.

The second section of the Act, as to the interpretation to be given to the word *county*, which is that it "includes every town, township, parish, and other division or municipality, except a city within the territorial limits of the county, and also a union of counties when united for municipal purposes," means this, that where the expression *county* is used in any section of the Act, in which section it is plain that expression is used in its general sense as applicable to all these different named localities within it, it shall be construed as applicable to all and to each one of them; but when any of these special localities are expressly named, as in section 103, and as more particularly applicable to this case to that part of the section, "or if the offence was committed in any city or town not having a police magistrate, &c.," that the word *county* in the second section has no application; but that the specially named localities are alone to be considered.

The word *city*, in the last quoted part of section 103, can not certainly be affected in the least by the second section, for a city is expressly excluded from being included within the term "county;" and *town* in section 103, being coupled along with the word "city," and being specially named in that section, must be excluded, equally with a city, from the enactment of section two.

I think therefore the motion should be absolute to quash the conviction, without costs, and that no action should be brought against the police magistrate who made the conviction, or against any officer acting under any warrant issued to enforce such conviction.

ARMOUR, J.—There was ample evidence to support the conviction, if that is a matter with which we have any concern, and I think it is not, and the only question is whether the police magistrate who made it had jurisdiction to make it, and that depends upon section 103 of The Canada Temperance Act, 1878, which provides that “Such prosecution may be brought in the Province of Ontario before any stipendiary magistrate, or before any two other justices of the peace for the county, city, or district wherein the offence was committed; or, if the offence was committed in any county, city, or town having a police magistrate, then before such police magistrate, or in his absence then before the mayor or any two justices of the peace, or if the offence was committed in any city or town not having a police magistrate then before the mayor thereof, or before any two justices of the peace.”

The Town of Perth is within the South Riding of the County of Lanark and Mr. Allan is commissioned as, and is, police magistrate for the South Riding of the County of Lanark, and by virtue of such commission has jurisdiction, as such police magistrate, within the Town of Perth, and consequently the Town of Perth may properly be said to have a police magistrate within the meaning of this section; and as the offence of which the defendant was convicted was committed within the Town of Perth, and the conviction was made within the Town of Perth, the prosecution was rightly brought before Mr. Allan.

I do not think that because his jurisdiction is not limited to the Town of Perth, but is more extensive, including not only the Town of Perth but the whole South Riding of the County of Lanark, he is any the less a police magistrate for the Town of Perth.

In my opinion, therefore, the order *nisi* must be discharged with costs.

O'CONNOR, J.—I have not considered it necessary to examine the evidence in this case with a view of forming a judgment thereon as regards the objection urged against it, because it seemed to me from the outset that the convicting magistrate had not jurisdiction. But I have no doubt the judgment of my learned brother, Armour, on the evidence, is well founded. Respecting the question of jurisdiction, however, I am quite unable to concur with my learned brother.

I cannot accept the argument, that because the Town of Perth is within the territorial limits of that part of the County of Lanark, called the South Riding of Lanark, and as the convicting magistrate had been appointed police magistrate for that Riding, therefore he is police magistrate for the Town of Perth within the meaning of the 103rd section of the Canada Temperance Act. The part of that section applicable here is: "If the offence was committed in any county, city, or town having a police magistrate, then," (the prosecution may be brought) "before such police magistrate, or, in his absence, then before the mayor or any two justices of the peace; or, if the offence was committed in any city or town not having a police magistrate, then before the mayor thereof, or before any two justices of the peace. It appears to me too clear to admit of any controversy that the term or expression in the section, "Any town having a police magistrate," means a police magistrate for the town specifically, not a police magistrate appointed for a district, being part of a county, which district comprehends the town within its limits.

The offence was committed in the Town of Perth, and that town has no police magistrate. It seems also clear that the same magistrate has not, by virtue of his appointment for part of the county, acquired jurisdiction in that part of the county, for the Temperance Act gives jurisdiction to a police magistrate for any county, not for part of a county;

and the fact that the magistrate, as in this instance, has another commission for the other part of the county, does not mend matters, because *nil* added to *nil* can only give *nil*.

I think the conviction should be quashed.

Conviction quashed.

[QUEEN'S BENCH DIVISION.]

RE HON. WM. MACDOUGALL.

Solicitor—Law Society certificate—Omission to take out—Use of name by firm of practising solicitors—Suspension—Penalty—R. S. O. ch. 140.

A solicitor who allows his name to be held out to the world as a member of a firm of solicitors, although not a partner in respect of the profits of the firm, is a practising solicitor within the meaning of R. S. O. ch. 140. M., a solicitor of the Court, allowed his name to be used by the firm of "M. M. & B." in the usual advertisements and business cards of the firm, and on all proceedings in the Courts the firm name of M. M. & B. was endorsed. M. however did not participate in the profits of the firm:

Held, notwithstanding, that he was liable to be suspended for practising without having taken out the usual annual certificate issued by the Law Society, and to the penalties imposed by the statute.
ARMOUR, J., dissenting.

On 3rd January last W. Read moved before O'Connor, J., to suspend Hon. W. Macdougall from practice for a period of three months, and that the suspension be continued until the fees due by him to the Law Society and a penalty of \$40 should be paid.

The learned Judge transferred the motion to the full Court.

The facts were not disputed. They appeared in the following extracts from the examination of Frank M. Macdougall, taken before a special examiner. He said: "I practice at Ottawa. The firm's name is Macdougall, Macdougall & Belcourt. That firm consists of Frank

M. Macdougall and Napoleon Belcourt. I am the only Macdougall in the firm. The card produced was issued by our firm."

It was, so far as is material, as follows:

MACDOUGALL, MACDOUGALL & BELCOURT,

AVOCATS, PROCUREURS, &c.,

Scottish Ontario Chambers,

OTTAWA - - - - ONTARIO.

HON. WM. MACDOUGALL, C. B.

FRANK M. MACDOUGALL.

N. A. BELCOURT, L. L. M.

"The name of the Hon. William Macdougall is on the card. He has nothing whatever to do with the firm. His name was put on the card by me at the time I entered into partnership with Mr. Belcourt. He makes our office his headquarters at present. At present he does his business there; he receives his mails there, and when in town usually comes to the office for his papers and letters every day. He has nothing to do with the firm business at all. Minutes of articles of partnership between Mr. Belcourt and myself were drawn. Mr. Macdougall's name did not appear in the minutes. Mr. Belcourt and I alone share the profits of the firm. Mr. Macdougall has the preference of being retained as counsel for the firm when we require counsel, but we have on several occasions employed other counsel in cases which we thought could be better handled. His name appears on that card and in the letter-headings, but he does not practise at all. It appears also in advertisements. I think so. I think not in papers filed in the Courts. I am prepared to say no writ has ever been issued by the firm of Macdougall, Macdougall and Belcourt. The writs are issued, and have always been issued, in the name of Belcourt, so far as it is possible for me to say. That is the usual course.

The firm's name is endorsed on the outside of the papers. That is the way the business is carried on. He has acquiesced in the name being used; he has always been aware of it. It is painted on the windows. The style of the firm appears on the sign. His name personally does not. There is a sign at the front of the office with the firm name, and his own name appears on that with the names of myself and Belcourt.

At the time of the partnership there was no intention that he should have any interest or any connection, good, bad, or indifferent, with the firm. He has never done any business for the firm except as counsel, and has nothing whatever to do with the ordinary work of the office even when present. He has a business of his own, in which the firm have no interest or connection whatever."

The examination then continued:

"What is that business of his own?"

"Advisory counsel for the North-West Telegraph Company—counsel business exclusively. He has a separate business as advising counsel and otherwise, with which we have no connection; and we have received from him business to be done by our firm which he, as a barrister, could not do acting as a solicitor. When I started with Belcourt in business the name of the firm was spoken of, and finally it was decided to carry it on by the name we have since used. We would pay him for his advice as counsel when his advice was required. One of the reasons he moved his office to our office was that the room he occupied in the telegraph building—he being their local advisory counsel—was required, and he, as a director of the company, had certain privileges from the telephone company, and in view of having the telephone in our office, and for his convenience as well, we arranged a room for him, which is exclusively his and that of his family."

"The fees as solicitor for the time in question, it was not disputed, had not been paid.

During Hilary sittings *Walter Read* supported the motion. The question is, is William Macdougall, being a solicitor, practising as a solicitor upon the facts stated and admitted?

Frank M. Macdougall shewed cause.

Reeve, Q. C., replied.

The following cases were cited: *Edmonson* q. t. v. *Davis*, 4 Esp. 14; *Re Taylor*, 16 Jur. 728; *Dawkins* v. *Vickery*, 46 L. T. N. S. 139; *Abercrombie* v. *Jordan*, *Re Hunt*, 8 Q. B. D. 187; *In re Horton*, 8 Q. B. D. 434; *Law Society of the United Kingdom* v. *Shaw et al.*, and the same Society v. *Waterlow and others*, 9 Q. B. D. 1; R. S. O. ch. 140, sec. 20.

March 11, 1887.—WILSON, C. J.—The section of the Statute referred to declares that

“If any attorney or solicitor, or any member of any firm of solicitors, either in his own name or in the name of any member of his firm, practises in any of the Courts of Queen’s Bench, Chancery, or Common Pleas, without such certificate being taken out by such attorney or solicitor and by each member of his firm, he shall forfeit the sum of forty dollars, which forfeiture shall be paid to the treasurer of the Law Society for the uses thereof, and may be recovered in any of the said Courts.

Sec. 21: “If any attorney or solicitor practises in any of the said Courts, or in the County Courts, without such certificate in each and any year of his practice, he shall be liable to be suspended from practice for any such offence in all of such Courts for a period of not less than three months nor more than six months, and to continue so suspended until his fee upon the certificate for the year in which he so practised without certificate is, together with the penalty of \$40, paid to the treasurer of the Law Society, and the proceedings for such suspension may be taken in any of the said Superior Courts.”

By section 25 "an attorney or solicitor who acts as the agent of any unqualified person, or who suffers his name to be used on account or for the profit of any unqualified person, or does any other act to enable such person to practise as an attorney or solicitor, knowing such person not to be duly qualified, may be struck off the rolls."

And by section 27 "any person not duly admitted or enrolled, unless a party in the proceeding, who prosecutes or defends in his own name, or in the name of any other person, shall not recover the fees, and he may be punished as for contempt of Court."

The following persons are therefore disqualified from acting as attorneys or solicitors :

1. Unqualified persons, whether practising in their own name or the name of another person.

2. Qualified persons, acting as the professional agents of any unqualified persons, or suffering their names to be used by any such unqualified persons.

3. Qualified persons, who have not taken out their yearly certificates.

4. Every qualified person, whether in his own right or as a member of any firm of qualified persons, who acts without a certificate being taken out by himself and by each member of his firm.

Certain other persons are also prohibited from acting, but their cases have no application in this motion.

These enactments are referred to for the purpose of shewing how carefully the Legislature was desirous of excluding not only unqualified persons from acting as attorneys or solicitors, but to prevent those who have been duly admitted and enrolled as attorneys or solicitors from practising who have not taken out their yearly certificate either singly or collectively as members of a firm, or from suffering unqualified persons to practise in their name.

It is contended, however, that the Act does not prevent a firm of attorneys or solicitors, consisting, for instance, of Frank Macdougall and Napoleon Belcourt, from publish-

ing upon their business cards and letters and upon their office-signs the name of another duly admitted and enrolled attorney and solicitor, as, for instance, the name of the Hon. William Macdougall, and from using as the name of their firm of Frank Macdougall and Napoleon Belcourt the name and style of Macdougall, Macdougall & Belcourt in all their law proceedings, so as to include the Hon. William Macdougall so long as the Hon. William Macdougall is not in fact a member of the firm, which consists only of Frank Macdougall and Napoleon Belcourt.

There being three separate persons, whose names are on the business cards, letters, and office signs, and as the use of the three names in the law proceedings of the firm apparently represents the three persons or names as being members of the firm, and as practising in partnership as solicitors, the question is, whether that is a case in which it can be said the three persons as members of the firm are practising as solicitors within the meaning and operation of the Act referred to.

A partnership may assume any name the members of it please to adopt, and it may be that the name of only one or more of the members may be the name of the firm, or it may be that the name of no one of the members may be the name of the firm, and the enquiry always is when, it is necessary to make the enquiry, who are, in fact, the members of the firm.

It may also be that a person may not be a member of the firm, but may be treated as such by those dealing with the firm, because he is held out to those so dealing with the firm as a member of it, and he suffers himself to be so held out as a member of it.

In this case it would be difficult for William Macdougall to escape responsibility as a member of the firm of Macdougall, Macdougall & Belcourt if he were proceeded against as one of the firm for money collected, or for any other liability incurred by the firm under that name, upon the facts appearing before me, although it was shewn that

in fact the firm, Frank Macdougall and Belcourt, alone comprised the firm.

The conclusion which I draw from the facts is, that William McDougall is not in truth a member of the firm, but that he has been and is held out by the members of it and with his express assent, as a member of the firm; and that he is and would be held liable, as a member of it, for the acts and omissions of the firm.

In *Edmonson, q. t. v. Davis*, 4 Esp. 14, the action was brought for penalties for practising as an attorney without having entered his certificate. It was argued for the defendant that, although all the proceedings in the action, in respect of which the penalties were claimed, were carried on in the name of Davis & Plaisted, Davis, the defendant, was not liable. By the articles Plaisted was to have all the profits of the action, as one which came to the office by reason of his own connections, and so Davis had no expectation in that suit of fee or reward, according to the statute 37 Geo. III. ch. 9, sec. 30; but Lord Kenyon, C. J., ruled that though the defendant might have no immediate benefit from the suit, he might have a benefit from it in another way, or from some other arrangement in the partnership, and "he has held himself out to the world as the attorney in the cause, and I think he must be declared so, and both would be liable for negligence."

The object of our Statute was to make all attorneys and solicitors practising the law liable for the annual fee, and every member of a firm practising the law liable for that fee; and I think a solicitor, who is held out by the firm and by himself as a partner of that firm, which is the case here, is, within the meaning and operation of the Act, a member of the firm which may be called his firm, for the purpose of subjecting him to the annual fee or certificate payable by practising attorneys and solicitors. If it were otherwise the one not a member, in fact, would be gaining the advantage of his name being before the public as a practising attorney, and would at the same time be attracting business to the firm by reason of his appearing to be

a member of it, which would be of great value to the firm, according to the name, standing, and repute of the particular person, and yet the fact held out would not be true, nor would the clients drawn to the firm by such means be receiving the advantages which were so held out to them; in fact, the person whose name is so used is in substance and in effect practising as a solicitor by the means before stated, and yet he does not pay the solicitor's fees, which it appears to me he is bound to pay. The way Mr. Macdougall suffers his name to be used is practising within the Act, for every time his name is endorsed upon the law proceedings as one of the solicitors carrying them on, it is the same as if he were standing by and directed his name to be so used, and in effect the same as if he himself were to write the name of the firm.

It is probable the Society may not press the motion after this expression of the opinion of the Court, and that the motion may be allowed to drop upon payment of all arrears for the years during such years as these proceedings have been carried on, and the costs of this motion; for we have no doubt the gentleman moved against has not acted in contempt of the statute or of this Court; and if there are other cases of the kind, and it is said there are, we hope they may all be settled in like manner. The order absolute will in the meantime not be issued until further order.

ARMOUR, J.—The facts are not in dispute, and as far as they are material are set forth in the judgment of the Chief Justice; and the only question is, whether upon these facts Mr. Macdougall can be said to practise in any of the Courts within the meaning of, and so as to subject himself to the penalties imposed by secs. 20 and 21 of R. S. O. ch. 140.

These are penal enactments, and the rule is, in construing an Act of Parliament every word must be understood according to its legal meaning, unless it shall appear from the context that the Legislature has used it in a popular or more enlarged sense. That is the general rule; but in a penal enactment, where you depart from the ordinary

meaning of the words used, the intention of the Legislature that those words should be understood in a more large or popular sense must plainly appear: *Stephenson v. Higginson*, 3 H. L. 638, and *Ford v. Webb*, 7 Moore P. C. 54, which were cognate cases with the present.

There is nothing in the R. S. O., ch. 140, from which it can be inferred, much less affirmed, that the Legislature, when it was imposing the penalties, in the sections referred to, against attorneys or solicitors practising in the Courts without certificates, intended that the word "practising" should have any other than its ordinary legal meaning; that is, acting in the said Courts as attorneys or solicitors for some other person in some proceeding cause, matter, or suit therein. This is apparent, also, from the terms of section 27; and it is quite clear that Mr. Macdougall has not so acted.

I am not disputing that Mr. Macdougall may, by what he is doing, and permitting to be done, be holding himself out as a partner in the firm of Macdougall and Belcourt, so as to render himself liable as such to persons having dealings with that firm, but that is another thing altogether from practising in the Courts as an attorney or solicitor. Holding himself out, so as to render himself liable as a member of the firm of Macdougall & Belcourt, when he is not in truth a member of it, cannot make him liable to the penalties imposed by these sections, when he is not in truth practising as an attorney or solicitor in the Courts; in short, I do not think that I am justified in holding advertising to be practising, so as to make Mr. Macdougall liable to these penalties.

In my opinion, therefore, the motion should be dismissed, with costs.

I refer to *Davis v. Edmonson*, 3 B. & P. 382; *Barnard v. Gostling*, 1 N. R. 245; *Gordon v. Dalzell*, 15 Beav. 351; *Pulling* 520.

O'CONNOR, J., concurred with WILSON, C. J.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

CLARKSON V. THE TORONTO STOCK EXCHANGE.

Toronto Stock Exchange—Insolvency of member—Sale of seat—Distribution of proceeds—Preference of Stock Exchange creditors.

F. & L., brokers in partnership, were both members of the Toronto Stock Exchange, being each the owner of one seat at the board. They assigned to the plaintiff for the general benefit of creditors in December, 1884. The Toronto Stock Exchange by their by-laws provided that in case of a member becoming insolvent and not procuring a release from his creditors within a named period, the Exchange should have power to realize the seats by sale, and the proceeds in such case were to be applied, first, in payment of fines and dues to the Exchange; secondly, in payment of claims arising out of Stock Exchange transactions of creditors, being members of the Exchange; and thirdly, the balance, if any, to be paid to the insolvent, or his legal representative. The seats of F. & L. were sold under the by-laws of the Exchange and the proceeds remained in the hands of the Exchange. Certain members of the Toronto Stock Exchange claiming to be creditors of F. & L. prior to their insolvency, for debts arising out of Stock Exchange transactions, filed claims under the by-laws prior to the sale of the seats. The plaintiff, on the other hand, claimed to be entitled to the seats and to the moneys arising from their sale under the assignment to him for the benefit of creditors. All parties concurred in the sale of the seats, subject to their respective rights. This action was brought by the plaintiff, as assignee for the benefit of creditors of F. & L., against the Toronto Stock Exchange for payment to him of the money realized from the sale of the seats:

Held, 1. That it was competent for the Toronto Stock Exchange to pass the by-laws in question giving the preference to the claims of the Exchange, and to claims of members of the Exchange for debts arising out of Stock Exchange transactions. 2. That the plaintiff was the legal representative of the insolvents and entitled to the payment to him of the balance of the moneys arising from the sale of the said seats after payment of fines and fees due to the Exchange and claims of creditors, members of the Exchange, arising out of Stock Exchange transactions. 3. Reversing the judgment of GALT, J., dismissing the action, that as the by-laws of the Exchange did not provide any means for ascertaining or deciding a contest as to what deductions might properly be made from the proceeds of sale of the said seats that it was proper to refer this matter for enquiry to the Master.

The plaintiff by his statement alleged (1) that he was the assignee of the estate of Forbes & Lowndsbrough, brokers, for the benefit of their creditors. (2) Defendants were a body corporate under the laws of Ontario. (3) That members of the defendant corporation became members by acquiring seats at the defendants' board, and each member by acquiring a seat became entitled to all the privileges of membership.

(4) That at the date of the assignment to the plaintiff, Forbes & Lownsbrough were members of the defendant corporation, and respectively held seats at the stock board of the defendants. (5) That by virtue of the assignment to plaintiff the said two seats passed to and vested in the plaintiff as assignee for the benefit of the creditors of Forbes & Lownsbrough. (6) That defendants being well aware of the facts aforesaid, and after plaintiff had claimed the right of property in said seats, and the right to sell the same, on or about the 4th February, 1886, sold the said two seats, claiming to have the right to do so by virtue of certain by-laws of defendants' corporation, and received therefor the sum of \$2,270 in cash. (7) That defendants denied that said seats passed to and vested in plaintiff, and denied his right to any part of the money so realised by the sale thereof, and refused to pay the said moneys, or any part thereof, to plaintiff, though as the fact was, plaintiff before action frequently applied to defendants for payment of the same. (8) That plaintiff did not object to the price realised by defendants for the said seats, and was willing, and did thereby adopt the sale for said sum of money. (9) That plaintiff therefore claimed (1) that defendants were trustees of the said sum of \$2,270, and interest thereon, from 4th February, 1886, for plaintiff, and bound to pay the sum to plaintiff; (2) that defendants were also liable to plaintiff for the said sum, as money received by defendants for the use of plaintiff; and (3) plaintiff claimed \$2,270, and interest from 4th February, 1886, costs of the action, and further and other relief.

The defendants by their statement (1) admitted that they were a body composed as alleged, and alleged (2) that the said corporation passed and adopted by-laws for the government and regulation of its affairs, and by said by-laws declared amongst other things (1) that if a member of the said corporation should become insolvent he should not have a right to dispose of his seat, but the said seat should revert to the control of the corporation; (2) that if the insolvent member should not procure a dis-

charge from his liabilities within a period of six months from his insolvency the managing committee might proceed to sell his seat; (3) should deduct from the proceeds of such sale all fees and fines due to the corporation, and all other liabilities of such member to the corporation, or any other member arising out of stock exchange transactions; (4) that if the proceeds, after first deducting the full amount due to the corporation, were not sufficient to pay the general claims of members of the corporation, they should be divided amongst them *pro rata*; and (5) that the balance, if any, should be paid to the legal representative of the insolvent; and the defendants further alleged that (3) F. & L. were members of the said corporation, and they subscribed their names to the constitution and by-laws of the corporation and became subject to the provisions thereof, and that they became insolvent and made an assignment of real and personal estate to the plaintiff. (4) That the seats of the said F. & L. did thereby revert to the control of the corporation, and that said insolvents did not procure a discharge from their liabilities within a period of six months from their insolvency, and the managing committee of said corporation proceeded and sold said seats on 4th February, 1886, and received therefor said sum of \$2,270, and this action was commenced on 6th February, 1886. (5) That Edward S. Cox and Robert S. Beaty, both of the city of Toronto, stockbrokers, and said F. & L., were old members of said corporation at said time for a long period before the insolvency of said F. & L., and also at the time of the reversion and sale of said seats, and said Edward S. Cox and Robert Beaty continued to be and were members of said corporation. (6) That said Edward S. Cox filed a claim with the managing committee of said corporation, alleging that said F. & L. were at the time of said insolvency of F. & L., and at the time of the reversion and sale of their said seats, indebted to said Edward S. Cox in the sum of \$15,483, for and on account of Stock Exchange transactions arising between them as members of the said corporation; and the said Robert Beaty filed a

claim with the managing committee, alleging that said F. & L. were indebted to him as aforesaid in the sum of \$75; and said F. & L. always had admitted that they were indebted as aforesaid to said Edward S. Cox and Robert Beaty in an amount exceeding said sum of \$2,270, realised from the sale of said seats, and they approved of the distribution of said sum *pro rata* between said Edward S. Cox and Robert Beaty. (7) That said claims of Cox and Beaty were liabilities within the meaning of said by-laws, and said claims had been presented and said admissions made in good faith; and defendants alleged their right and power to act thereon and to pay said moneys to the parties entitled thereto under the provisions of said Act and by-laws. (8) That said liability of said insolvents to Cox and Beaty was a preferential lien and charge upon said money, and it was the duty of defendants to account for and pay the money to them. (9) That defendants had the exclusive right and power to administer the money realised from the sale of said seats, and to declare the proper appropriation thereof under said Act and by-laws which had been passed in pursuance thereof; and that such appropriation and declaration made in good faith would be a final determination thereof as against said insolvents and their legal representative; and they denied any liability to plaintiff; and they denied the claim of plaintiff in this action for an account of the said money; and they denied that he was the legal representative of the insolvents, referred to in said by-laws, and they referred to said by-laws; and alleged all the provisions thereof in defence of their action. (10) Defendants submitted that if this Court should be of opinion that plaintiff was entitled to open up the question of the appropriation of said money, and to dispute the claims of said Cox and Beaty, then and in such case the questions of liability in regard thereof should be determined and decided by arbitration under the provisions of the said by-laws, and in accordance with the custom and usage of the Stock Exchange. (11) The defendants further submitted that if

this Court should be of opinion that they had not the legal right and power to pass said by-laws for the government and regulation of their affairs, and that said Forbes & Lownsbrough were not bound by their subscription of the constitution and by-laws of the corporation, but that they had, and plaintiff had the compulsory right to the trial of said claims by this Court, then and in such case that it might be referred to a proper officer to take the account of such claims, and that it should be declared that the account should be taken in accordance with the custom and usage of the Exchange, and that said Cox and Beaty might be declared to have a preferential lien and charge on the said money for the amount which might be found to be due and payable to them.

Joinder of issue.

The case was tried by Galt, J., without a jury, at the last Spring Assizes at Toronto.

It appeared that on and prior to the 26th of December, 1884, Forbes and Lownsbrough were members of the Stock Exchange, and that Edward S. Cox was also a member: that on that day said Forbes and Lownsbrough, being unable to meet their liabilities as they matured, and being desirous of having their assets disposed of and applied in payment of their liabilities, ratably and proportionably, and without preference or priority, assigned, and each assigned, among other property, "all and singular the personal estate and effects, money, stocks, shares, debentures, bills, bonds, chattels, stocks, rights, credits, fixtures, book debts, books of account, notes, choses in action, household furniture, except thereout such articles as are exempt from seizure and sale under execution, and all other assets and effects whatsoever and wheresoever situate, which they the said debtors are or either of them is possessed of or entitled, to or to or upon which they or he have or has any claim, right, interest, or demand, including among all others those set out or mentioned in the schedule hereto annexed marked B."

It was shewn that the defendants and Edward S. Cox had full notice of this assignment at or shortly after the time it was made.

On 3rd November, 1885, Cox wrote as follows to the chairman of the executive committee of the defendants:

"In the year 1884 the firm of Forbes & Lownsbrough, members of the Exchange, suspended and made an assignment. At the date of such assignment they were and now are indebted to the firm of Cox & Co., of which I am a member. The indebtedness now amounts to \$15,383, and I beg to ask for the sale of their seats for my benefit, as provided for by our by-laws."

On 10th January, 1886, H. R. Forbes and Thomas Lownsbrough, formerly comprising the firm of Forbes & Lownsbrough, wrote as follows to the president of the defendants:

"About the month of December, 1884, we became insolvent within the meaning of the Stock Exchange by-laws, and at that time were indebted to Cox & Co. and Robert Beatty & Co. in respect of Stock Exchange transactions, and we are desirous of having our seats sold, and the proceeds divided *pro rata* between them."

On 4th of February, 1886, the managing committee of the defendants, assuming to act under the by-laws then in force, sold the seats of Forbes & Lownsbrough, and on 6th February, 1886, and before the managing committee dealt with or had assumed to deal with the proceeds of such sale, this action was brought.

The by-laws then in force were passed on 12th October, 1885, and the following were those relating to the question at issue:

19.

Sec. 1: "A member of the corporation becoming insolvent or bankrupt, or becoming a defaulter within the meaning of any of these by-laws, shall not be entitled to be present at any meeting of the corporation or of the board whilst so insolvent, bankrupt, or a defaulter."

Sec. 2: "A member of the corporation shall be deemed insolvent or bankrupt within the meaning of these by-laws,

if he comes under the operation of any insolvent or bankrupt law now or hereafter in force in Canada, or if he makes an assignment in favor of his creditors."

Sec. 3: "He shall not have a right to dispose of his seat but the said seat shall revert to the control of the corporation, to be dealt with as hereinafter provided; and he shall not have any of the rights or privileges of a member unless and until he has procured his discharge and been re-admitted under the provisions hereinafter contained."

Sec. 4: "An insolvent or bankrupt in getting his discharge shall be allowed to apply to the managing committee for re-admission to the corporation at any time within a period of six months from the date of said insolvency or bankruptcy in manner provided for in by-law No. 14."

Sec. 7: "In case an insolvent or bankrupt does not procure within said period of six months a discharge from all his liabilities, and does not apply for re-admission within said period, or in case the applicant is not elected, then the managing committee may proceed to sell his seat by tender or otherwise, and the proceeds to the extent necessary for that purpose shall be disposed of as provided for in secs. 3 and 4 of by-law No. 18, and the balance, if any, shall be paid to the legal representative of the bankrupt or insolvent."

18.

Sec. 3: "The managing committee shall deduct from such proceeds of sale all fees and fines due to the corporation by the member so withdrawing, and all other liabilities of such member to the corporation or any other member or his legal representative thereof, arising out of a stock exchange transaction."

Sec. 4: "If the proceeds (after first deducting the full amount due the corporation) are not sufficient to pay the proved claims of the members and the legal representatives of deceased members, if any, then they shall be divided amongst these *pro rata*."

Sec. 5: "The balance of such proceeds, if any, after payment of such liabilities to the corporation, and such

proved claims, shall be handed over to the member so withdrawing, or in case of death, as aforesaid, to his legal representative."

22.

"All moneys received shall be disposed of as decided by the managing committee."

9.

Sec. 1: "Meetings of the managing committee may be called by the chairman or by any member of the committee, at least one hour's notice in writing of which meeting shall be given to all members of the committee by delivery of such notice personally or at their respective places of business."

Sec. 2: "They shall choose their own chairman and also a secretary."

Sec. 3: "The managing committee, of whom four shall form a quorum, shall control the business and expenditure, engross the rules and by-laws, and take cognizance of offences against them, and regulate all matters of detail not herein specially provided for, and generally supervise and direct all matters affecting the interests of the corporation."

Sec. 4: "Decisions of the managing committee may be appealed from to the corporation at a meeting specially called for the purpose of considering the matter of such appeal; but may not be reversed or altered except by a vote carried by a majority of two-thirds of the members voting at such meeting."

The learned Judge gave the following judgment:

This case was tried before me without a jury. The plaintiff claims as assignee of the estate, real and personal, of Forbes & Lownsbrough, lately doing business together as brokers in the City of Toronto, for the benefit of their creditors. The subject matter of the claim is a sum of money received by the defendants as the price of the seats of the assignors, as members of the Stock exchange. The defendants allege

that the said Forbes & Lownsbrough became insolvent, and in consequence thereof, their seats at the board, as members of the Stock Exchange, did thereby revert to the control of the corporation, and that the corporation sold the said seats, and received therefor the money which is now sought to be recovered. They then set out their defence, which may be briefly stated as follows, viz., that certain persons therein named, being members of the Stock Exchange, having claims against the said firm of Forbes & Lownsbrough, arising out of dealings on the Stock Exchange, had a preferential claim under the by-laws of the Stock Exchange. They then allege that they have the exclusive right and power to administer the money realized from the sale of the said seats, and to declare the proper appropriation thereof under the Act of incorporation, and by-laws which have been passed in pursuance thereof. The nature of what may be called the right of property in seats at the board of the Stock Exchange has been so fully considered by Wilson, C. J., in the case of *London and Canadian Loan Co. v. Morphy et al.* 10 O. R. 86, that it is unnecessary for me to refer at length to the statute or by-laws, as the effect of that judgment is, that seats at the Exchange cannot be sold under execution or taken under a writ of sequestration. Mr. Arnoldi, however, contended that as in the present case the seats had been sold by the defendants, the money received by them was payable to the plaintiff as assignee, otherwise there would be a fraudulent preference in favour of the creditors who were members of the Stock Exchange. He cited and relied on the case of *Ex p. Saffery, In re Cooke*, 4 Ch. D. 555, subsequently affirmed in 3 App. Cas. 213. That case, however, differs essentially from the present. It was under the provisions of the Bankruptcy Act, and moreover the money sought to be recovered had been paid by the bankrupt, when he was aware that he was insolvent, to the what are termed the "official assignees" of the Stock Exchange, to be distributed by them among his stock exchange creditors, leaving his other creditors unpaid. The bankrupt had entire control

over this money. In the present case, by the by-laws, a person becoming insolvent loses all interest over his seat, it becomes saleable by the corporation, and the proceeds are to be applied in the manner set forth in the by-laws. Forbes and Lownsbrough were members of the corporation from its inception; they held their seats under the terms of the by-laws, and had no power whatever to dispose of their seats except under those provisions. In my judgment the defendants have the control of the purchase money realized from the sale so far as the provisions of the by-law extend; that is to say, under sec. 4 of by-law 23 (of the original by-laws), or sec. 3 of by-law 18 (of the revised by-laws passed in 1885). This was the question discussed before me. I therefore dismiss the action, with costs, but without prejudice to the right of the plaintiff to institute further proceedings, if he can show that any balance remains in the hands of the defendants after the payment of the claims which are covered by the above by-laws.

On February 8, 1887, *Arnoldi* moved to set aside the judgment, and to enter it for the plaintiff, or for a new trial, on the grounds: (1) That said judgment was erroneous, and is against the law and evidence, and weight of evidence. (2) Because the by-laws and constitution of the defendants did not give them the right as against the claim of the plaintiff to adjudge who were entitled to the moneys claimed, or to distribute the same, or to retain the same from the plaintiff. (3) Because the rights claimed by the defendants to deal with the said moneys for the benefit of a particular class of creditors under their by-laws was a fraudulent preference, and tended to cause a fraudulent preference contrary to the statutes and laws in that behalf, and all such by-laws were void on that ground, and because they were against public policy. (4) Because it appeared at the trial, and was in evidence, that the defence in this action was actually maintained by Cox & Co., or by one, E. S. Cox, claiming to be a creditor of the insolvents within the alleged by-laws and rules of the defendants,

and that Cox & Co. and E. S. Cox had indemnified the defendants on the record against all loss, costs, charges, &c. by reason of their said defence of this action, and the said Cox & Co., or E. S. Cox, were by means of the defence of this action, attempting to obtain an undue preference in the distribution of the insolvents' assets. (5) It was not shewn by the defendants that there was any claim made upon them by the said Cox & Co., or E. S. Cox, or any other person, for a liability due by the said Forbes & Lownsbrough for fees, or fines, or other liabilities to the defendants, or to any member of the defendants' corporation, or the legal representative of any member, arising out of a stock exchange transaction. (6) In any case the said Cox & Co., or E. S. Cox, being in fact the real defendant in this action, was bound to prove a claim for a liability of Forbes & Lownsbrough to them or him, arising out of a stock exchange transaction, which he failed to do; and the said Cox & Co., or E. S. Cox, should have been ordered to have been made a party to this action, and should now be made a party. (7) The seats of the said Forbes & Lownsbrough at the board of the defendants, and proceeds of sale thereof in the defendants' hands, were assets for the payment of their liabilities to their creditors generally, and the effect of the defendants' by-laws and constitution was not to create a forfeiture of the said seats under the circumstances that had occurred, or to withdraw the same from the general assets for payment of creditors, but at most to give the defendants the right to control and compel the sale of the seats, and the provision of the said by-laws for distribution of the proceeds of sale thereof contemplated the case of their being no creditors of the insolvents other than members of the board of the defendants. (8) It was not and never was competent for the defendants to pass by-laws withdrawing assets of insolvent members from the general creditors, and so far as the by-laws in question attempted this they were *ultra vires* and void. (9) And for other reasons; and because on the whole case the judgment should be entered for the plaintiff.

Ritchie, Q. C., shewed cause.

March 11, 1887. ARMOUR, J.—The plaintiff adopts the sale of the seats made by the defendants managing committee, but disputes the right of the committee to dispose of the proceeds in the manner provided for by the defendants' rules, by deducting therefrom all fees and fines due to the defendants by Forbes & Lownsbrough, and all other liabilities of Forbes & Lownsbrough to the defendants, or any other member, or his legal representative, thereof arising out of a Stock Exchange transaction, and claims the whole proceeds of the sale for the benefit of the creditors of Forbes & Lownsbrough generally, to be distributed under the terms of the assignment.

The assignment to the plaintiff no doubt conveyed to him whatever right Forbes & Lownsbrough had to the seats, subject, however, in all respects, to the defendants' rules, and the plaintiff is the legal representative of Forbes & Lownsbrough within the meaning of the defendants' rules, and is entitled to the proceeds of the sale of the seats, subject to the deductions provided for in the rules.

Being the assignee of Forbes & Lownsbrough by a voluntary assignment made by them to him, the plaintiff acquired no greater right than they had, and only took whatever right they had to the seats and no other or greater right; and took only subject in all respects to the defendants' rules.

The defendants are therefore entitled to claim the deductions from the proceeds of the sale of the seats provided for by their rules.

These rules provide for the arbitration of certain disputes therein referred to; but disputes as to these deductions are not included, and there is no domestic forum provided by the rules for the settlement and adjudication of such last mentioned disputes. The managing committee are merely directed to make these deductions, and if the proceeds, after deducting the full amount due the corporation, are not sufficient to pay the proved claims of

the members and the legal representatives of deceased members, if any, then they shall be divided amongst them *pro rata*.

There is nothing in all this which either by express words or necessary inference ousts the jurisdiction of this Court to deal with these proceeds, and the jurisdiction of this Court is never otherwise ousted.

I refer to *Lumsden v. Scott*, 4 O. R. 323; *Municipal Permanent Investment Building Society v. Kent*, 9 App. Cas. 260; *Mulkern v. Lord*, 4 App. Cas. 182, and cases there cited; *Re Royal Liver Friendly Society*, Ch. Div., Chitty, J., February 11.

In my opinion, therefore, it ought to be referred to the Master of this Court to ascertain and state what deductions should be made from the proceeds of the sale of the said seats under the rules of the defendants now in force, and that further directions and costs should be reserved until after the said Master shall have made his report.

WILSON, C. J.—I agree the defendants cannot oust the Court of its jurisdiction. There is nothing, therefore, to prevent plaintiff from maintaining his action. I refer to *Scott v. Avery* in 5 H. L. 811.

O'CONNOR, J., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA V. PIERCE.

Criminal law—32 & 33 Vic. ch. 20, sec. 58—Bigamy—Second marriage contracted out of Canada—Mis-direction—Non-direction—Sufficiency of indictment—Nullity.

The prisoner was convicted of bigamy under 32 & 33 Vic. ch. 20, sec. 58, which enacts that whosoever, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, is guilty of felony * * * provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in Canada, by any other than a subject of Her Majesty, resident in Canada, and leaving the same with the intent to commit the offence.

The first marriage was contracted in Toronto, the second in Detroit, U. S. The Judge at the trial directed the jury that if the prisoner was married to his first wife in Toronto and to the second in Detroit they should find him guilty :

Held, a misdirection, and that the jury should have been told in addition that before they found him guilty they ought to be satisfied of his being at the time of his second marriage a subject of Her Majesty resident in Canada, and had left Canada with intent to commit the offence ; and *Held* that it was incumbent on the Crown to prove these matters.

Quere, per WILSON, C. J., whether the trial should not have been declared a nullity.

CASE reserved by Rose J., at the last Toronto Summer Assizes.

The defendant was indicted for bigamy, the indictment containing three counts :

1. The charge of the bigamous marriage with the woman so married, in Detroit, in the State of Michigan, in the United States of America.

2. The allegation that the defendant was a British subject, and that he left Canada to contract such second marriage.

3. That the defendant was afterwards apprehended for the offence in the county of York, where the venue was laid and the defendant was tried.

The prisoner's counsel contended the defendant was not proved to be a British subject ; nor that he left this country with intent to commit the offence.

The learned Judge decided that as the facts of the defendant being a British subject and his leaving the country with intent to commit the offence were contained in an exception in the statute, the disproof of these facts was properly the subject of defence, and need not be proved by the Crown.

The learned Judge, however, was of opinion that even if it were necessary for the Crown to prove the allegations of the defendant being a British subject and of his leaving with intent, &c., there was sufficient evidence of these facts for the jury to determine them.

The question was then reserved whether, upon the said facts as they appeared in the evidence, the prisoner could legally be convicted of the offence charged in the indictment.

The question stated was, Was the prisoner, on the said facts, legally convicted of the offence charged against him ?

The case was argued, in Michaelmas Sittings last, before Wilson, C. J., and O'Connor, J.

Bigelow, for the defendant.

Johnston, for the Attorney-General.

The following cases were cited : *Regina v. McQuade*, 2 L. C. R. 340 ; *Steele v. Smith*, 1 B. & Ald. 94 ; *The King v. Turner*, 5 M. & S. 206 ; Arch. Cr. Pl. & Ev., 20th ed. 239, 1009 ; *Regina v. Jukes*, 8 T. R. 542.

There being a difference of opinion on the part of the learned Judges, the case was again argued during Hilary Sittings before the full Court by the same counsel, when the following further cases were cited : *Spiers v. Parker*, 1 T. R. 141 ; *Andree v. Fletcher*, 2 T. R. at p. 164, per Ashurst, J. ; *The King v. Stone*, 1 East 644 ; Arch. Cr. Pl. & Ev., 20th ed., 70 ; 2 Hawk. ch. 25, sec. 113.

The evidence, together with what transpired at the trial, is set out in the judgment of Wilson, C. J.

March 11, 1887. WILSON, C. J.—The defendant was tried under the 32 & 33 Vic. ch. 20, sec. 58, which enacts that

“Whosoever, being married, marries any other person during the life of the former husband or wife, whether the second marriage has taken place in Canada or elsewhere, is guilty of felony, and shall be liable to be imprisoned, &c. ; and any such offence may be dealt with, enquired of, tried, determined and punished in any district, county or place in Canada where the offender is apprehended or is in custody, in the same manner in all respects as if the offence had been actually committed in that district, county or place.”

“Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in Canada by any other than a subject of Her Majesty resident in Canada, and leaving the same with intent to commit the offence; or to any person marrying a second time whose husband or wife has been continually absent from such person for the space of seven years then last past, and was not known by such person to be living within that time; or shall extend to any person who at the time of such second marriage was divorced from the bond of the first marriage; or to any person whose former marriage has been declared void by the sentence of a court of competent jurisdiction.”

I am fully satisfied, upon whomsoever the proof rested, that there was satisfactory evidence given upon which the jury could have found the defendant was a British subject, and that he did leave this country with intent to commit the offence; but the difficulty is that we are asked to say “whether upon the said facts, as they appear in the evidence, the prisoner could legally be convicted;” and the first objection is, that the defendant’s counsel contends the evidence shews he was prevented from cross-examining the witness, Mary Ann Campbell, the sister of Mrs. Pierce, in order to shew the defendant did not leave this country with the intent charged, but because he and his wife did not live happily together.

Mary Ann Campbell said, in cross-examination :

"They" (the defendant and his wife) "lived happily enough together until that girl came across."

Q. And jealousy began to creep into the heart of your sister ?

A. I do not know whether she was jealous or not.

Q. Didn't she make the house very warm ?

A. No.

Q. It was cold ? Did she continually find fault with him ?

HIS LORDSHIP.—Is this in issue ?

Mr. Bigelow.—It is shewn that he left Hamilton for some specific purpose.

HIS LORDSHIP.—It is the mere fact of proving that signature and living there as husband and wife, for which the witness was called.

Mr. Bigelow.—But there are other issues than simply marriage in this case. In the meantime, I decline to cross-examine under your Lordship's ruling. If it becomes necessary before the close of the case to cross-examine her again—

HIS LORDSHIP.—I am not asking for remarks, I am merely ruling at present that the issue is marriage or no marriage.

Mr. Bigelow.—That is the real issue : on your Lordship's ruling I decline to cross-examine her.

Upon that statement of what took place, it appears to me the cross-examination was not irregular : it was admissible for the purpose of shewing the defendant left the country because he and his wife did not agree, and so not with the intent of his marrying the other woman. *Mr. Bigelow* should not, I think, have stopped his cross-examination at that point. He said : " In the meantime I decline to cross-examine : if it becomes necessary before the close of the case I shall cross-examine her again."

The learned Judge did not expressly say he would not allow the cross-examination to be proceeded with, but *Mr. Bigelow* may have reasonably understood the learned Judge as so deciding, for the learned Judge said : " I am not ask-

ing for remarks, I am merely ruling at present that the issue is marriage or no marriage." To which Mr. Bigelow said : " That is the real issue. On your Lordship's ruling I decline to cross-examine her."

At the close of the evidence the counsel for the Crown and the defendant argued the case upon the evidence.

Mr. Bigelow contended there was no evidence to prove the defendant was a British subject, nor that he left the country with intent, &c. The learned Judge answered, he might, if he so desired, shew the defendant was not a British subject. Mr. Bigelow said the onus did not rest upon him ; and he restated his objection, " that there is no evidence the defendant is a British subject, nor that he left with intent," &c. The counsel for the Crown contended there was evidence to go to the jury on all the points. Mr. Bigelow said : " I do not think it necessary to argue the case at this stage. The ruling of your Lordship stopped my cross-examination as to the defendant's reason for leaving Hamilton. The issue is marriage or no marriage."

HIS LORDSHIP : " I stopped your cross-examination on that ground expressly because the cross-examination on the relations which were sustained between the parties at that time was not evidence."

Mr. Bigelow : " Your Lordship stated the reason, which is noted."

HIS LORDSHIP : " You must take your course."

Mr. Bigelow : " I must take my own course ; the only question is, whether we can take (*sic*) after your Lordship's ruling."

HIS LORDSHIP : " If there is any doubt then the point can be raised ; if counsel hand in any authorities I will reserve a case."

This further discussion, as I understand it, shews the learned Judge stopped the cross-examination expressly on the ground that the issue was marriage or no marriage, and that the relations between the defendant and his wife at that time were not evidence ; or, as he said at the first

discussion, because the witness under cross examination had been called to give evidence only of the defendant's signature, and that the defendant and his wife lived together for some time as husband and wife.

According to the notes the cross-examination was allowable generally, for the witness was sworn, and was examined-in-chief, and gave evidence, and the fullest cross-examination was therefore admissible, as it would have been although she had been called only to prove a document, or the fact of the first marriage; and the cross-examination should not have been stopped, for the intent with which the defendant left the country was part of the alleged offence, and the manner in which the parties lived together and their conduct generally towards each other, particularly whether they lived happily together or led a quarrelling, unhappy life, was very important evidence in the cause; for unhappiness, if it existed, might have been the reason for the defendant going away; and if that were proved it would, or might, disprove the criminal intent.

The defendant may have been prejudiced by the ruling against him, and I think it may be presumed he was prejudiced. He is therefore entitled to relief if the matter is within the terms of the reservation. The learned Judge has set out the point which was taken by the counsel for the defendant at the trial, that he argued it was for the Crown to prove the defendant was a subject of Her Majesty, and that he left with intent, &c., and that these facts had not been proved; and the learned Judge states his ruling upon the law on that point as follows: "I held that the provision, being by way of exception, is properly a matter of defence, and need not be negatived by the prosecution; but even if it be necessary for the prosecution to negative the statutory exceptions, there was sufficient evidence to go to the jury for that purpose."

There certainly was sufficient evidence of these facts to go to the jury, but the evidence to which the case refers shews these facts were not left to the jury; the intent, &c. appears, at any rate, not to have been left to them to find upon.

The charge of the learned Judge was as follows :

"The law makes it an offence if a person being married marries any other person during the life of the former husband or wife, whether the second marriage has taken place in Canada or elsewhere. The Crown has shewn the marriage in Canada with a person resident in Canada, and a residence in Canada after the marriage. The Crown has also shewn a second marriage that has taken place elsewhere than in Canada ; therefore the Crown has shewn—the evidence being relied on—all the facts necessary to constitute an offence under these words."

The learned Judge then referred to the proviso in the Act, that it did not apply to any other than those who were subjects of Her Majesty, and who were resident in Canada, and who left Canada with intent to marry again, and he then proceeded :

"I think there is evidence to go to you, to satisfy you *primâ facie* that the person is a subject of Her Majesty resident in Canada ; that he was resident in Canada at the time of his marriage"—[the *first* marriage, I presume, is meant] ; "that he being a resident here must be taken *primâ facie* as a subject of Her Majesty. I think moreover, as a matter of law, that it would be part of the defence of the prisoner to shew that the second marriage was contracted by him, not being a subject of Her Majesty ; in other words, that he was the subject of a foreign country. On these grounds, as a matter of law, I would direct you, if you believe these two persons were married in Toronto, and that the prisoner was married again to that other person in Detroit, that you must find him guilty of bigamy ;" and the defendant was convicted.

As the evidence is made part of the case, and as the intent, &c., was material, and the defendant was prevented from examining as to the intent in the manner and to the extent before stated, which may have prejudiced him, and which may be presumed to have prejudiced him, he is entitled to maintain that objection now. There was a failure of justice, therefore, in that respect, upon whomsoever the proof of the intent properly rested.

The second part of the case to be considered under the question reserved, "Was the defendant legally convicted of the offence charged according to the facts set out in the case, and appearing in the evidence which is a part of the case?" is, so far as it applies to that part of the case, Upon which side does the burden of proof rest, the Crown to prove, or the defendant to disprove, that he, the defendant, is a British subject resident in Canada, and that he left Canada with the intent to commit the offence charged? The *mere* fact upon which side the burden of proof rests is not material here, for the case shews that evidence sufficient was given to prove these matters. The question is material only because the learned Judge was of opinion the disproof of them lay upon the defendant, inasmuch as these matters were contained in an exception or proviso of the Statute, and not in the enacting clause, which declared what matters should constitute the offence; and because in the statement of his opinion to the jury to that effect he may have prejudiced the defendant; and because, in accordance with that opinion, he did not leave these matters to be found upon by the jury; and the charge in that respect would not be correct if the proof of any of these matters lay upon the Crown and not upon the defendant. The facts of the defendant being a British subject, &c., were certainly allegations necessary to be made in the indictment, whichever side had to meet them by proof; but I am not satisfied the disproof rested upon the defendant, although these matters were contained in an exception or proviso of the enacting clause; for if they are shewn to be a material part of the offence or description of it, they must not only be alleged but be proved also by the Crown, and the inquiry is, are they an essential part of the offence or not?

I refer to the following statement of the law:

"Where the circumstances go to constitute a crime they must be set out. Where the matter is a crime independently of such circumstances they may aggravate but do

not contribute to make the offence": *Rex v. Horne*, Cowp. 683.

It is a general rule that when the Act is not in itself unlawful, but becomes so by its peculiar circumstances and relations, all the matters must be set out in the indictment in which the illegality consists: 1 Ch. Cr. Law 229.

In *Wells v. Iggulden*, 3 B. & C., at p. 188, Holroyd, J., said: "The exception is totally separate from the enactment; it was not therefore necessary for the plaintiff to negative it. Had it formed a qualification of that which went before and been incorporated with it, then it would have been necessary, according to Plowd 376-410." Bayley, J.: "Upon that point I have no doubt. Statutes are not divided into sections upon the rolls of Parliament, and therefore the mere placing a proviso in the same section of the printed Act does not make it necessary to notice it in pleading unless it is incorporated in the enacting sentence."

In *Spiers v. Parker*, 1 T. R. 141, the Act declared that certain persons should not be impressed unless any of such persons shall have deserted from any ships of war belonging to Her Majesty; and the declaration for penalties in an action brought by one who alleged he had been wrongfully impressed did not negative that he had not deserted from any of Her Majesty's ships of war, but only from Her Majesty's ship called the "Desmond." Judgment was arrested because of the want of the necessary negating the averment. The exception was in the enacting clause.

It was said by Mansfield, C. J., "It is a settled distinction between a proviso in the description of the offence and a subsequent exemption under certain circumstances. If the former, the plaintiff must negative the exceptions in the enacting clause, though he throw the burden of proof upon the other side."

Buller, J.: "I do not know any case for a penalty, where there is an exception in the enacting clause, that the plaintiff must not shew that the party whom he sues is not within it." Ashurst, J., expressed himself in like manner.

In *Simpson v. Ready*, 12 M. & W. at p. 740, Alderson, B., said : " There is a manifest distinction between a proviso and an exception. If an exception occurs in the description of the offence in the statute the exception must be negatived, or the party will not be brought within the description ; but if the exception comes by way of proviso, and does not alter the offence, but merely states what persons are to take advantage of it, then the defence must be specially pleaded or may be given in evidence under the general issue, according to the circumstances." See also *Thibault v. Gibson*, 12 M. & W. 88.

In *VanBoven's Case*, 9 Q. B. 669, the question was, whether on a prosecution under section 50 of the Act the exceptions in the 4th section should have been negatived. It was a conviction.

Coleridge, J., said : " It is in substance a distinct and independent clause of exceptions, and therefore it would properly be for the defendant to bring himself within it by way of defence. It was argued for the defence," (in which argument Coleridge, J. seemed to concur), " the general rule did not apply where the excepting clause did not create personal exemptions, but introduced limitations or modifications into the definition of the offence ; that it was essential for the conviction to state all circumstances constituting an offence, and that no offence was stated because it could not be contended that merely for being within a league of our coast with tobacco stalks on board every foreign vessel was liable to forfeiture. Supposing there was no such clause in the Act as the fourth, it might seem a strong thing for the legislature to have passed such an Act, but it could not have been contended here that a vessel brought within its terms was not also within its penalty. It is clear, therefore, that *primâ facie* an offence is stated ; and an argument against the defendant is, that in the body of the enacting section (the 50th) there are several exceptions which it clearly would be necessary to negative ; while the fourth section is quite separated from it, and it seems to follow that it was intended to leave the

latter as matter of defence, and that the exclusion of them in the first instance is not necessary to constitute the offence."

Erle, J., agreed with Coleridge, J., and said it was important to adhere to the rule, though it was not absolutely universal, that exemptions in a distinct clause need not be negatived.

In *Arch. Criminal Pleading and Evidence*, 20th ed., p. 70, it is said: "If there be any exception contained in the same clause of the Act which creates the offence, the indictment must shew negatively that the defendant or the subject of the indictment does not come within the exception, and many authorities are referred to.

And the rule is the same, although the Statutes cast upon the defendant the burden of proving that he comes within the exception: *Regina v. Harvey*, L. R. 1 C. C. R. 284.

If, however, the exception or proviso be in a subsequent clause or statute—*Regina v. Hall*, 1 T. R. 320; or although in the same section—yet if it be not incorporated with the enacting clause by any words of reference—*Steele v. Smith*, 1 B. & Ald. 94—it is in that case matter of defence for the other party, and need not be negatived in pleading.

And at p. 239 it is said in *Arch. Criminal Pleading and Evidence*: "In indictments upon Statutes, where an exception or proviso is mixed up with the description of the offence in the same clause of the Statute, the indictment must show negatively that the party or the matter pleaded does not come within the meaning of such exception or proviso."

The negative averments seem to have formerly been proved in all cases by the prosecutor, but the correct rule on the subject appears to be that in cases where the subject of such averment relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant as matter

of defence; but, on the other hand, if the subject of the averment do not relate personally to the defendant or be not peculiarly within his knowledge, but either relate personally to the prosecutor, or peculiarly within his knowledge, or at least be as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative.

An information on the game laws must aver negatively the defendant's qualification to kill game, but the defendant must prove his qualification: *Rex. v. Turner*, 5 M. & S. 206.

So an information for selling ale without a license must negative a license to sell, but the defendant must prove he had a license: *Paley* on Convictions, citing *Rex v. Hanson*, 1 Hawk. ch. 89, sec. 17; *Apothecaries Co. v. Bentley*, 1 C. & P. 538, R. & M. 159.

The present Act relating to bigamy in England is the 24 & 25 Vic. ch. 100, sec. 57.

It is said at p. 1015 of *Arch. on Pl. & Ev.*, "The following are good defences to an indictment for bigamy:

1. That the wife or husband of the party indicted has been constantly absent for seven years, &c.

2. That before the second marriage the party indicted was divorced from the first marriage.

2. That the former marriage was declared to be void," &c. It does not mention the first exception in the Act.

4. "Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty."

In *Roscoe's Evidence in Criminal Cases*, 10th ed. n. (1884) 340, 341, it is stated *the prisoner* may prove in defence all the four exceptions in the Act, the first as well as the latter three; that the burden is on him to prove he is not a subject, and that the marriage was not contracted in England or Ireland.

I do not find in any of the precedents that an indictment under the Imperial Act 24 & 25 Vic. ch. 100, sec. 57,

nor under the prior Act, 9 Geo. IV., ch. 31, sec. 22, was drawn differently from the form of indictment which is ordinarily used. There is no allegation in them that the second marriage was contracted by a subject or not; nor that any such marriage was contracted by the subject out of England or not; and it may be that it is not necessary for the Crown to *prove* the fact of the defendant under our statute being a subject or not, or being a resident in Canada at the time he left it; but it does not follow that the leaving with intent, &c., must not only be alleged but proved also by the Crown; on the contrary, I think the *intent* must be proved by the Crown, for it is an actual part of the offence, and in that case it is of no consequence whether the *intent* is contained in an exception or not. There was evidence sufficient to prove it. The learned Judge expressed the opinion the Crown need not prove it, and he charged the jury to the like effect.

And if the *leaving with intent* to commit the offence is an element in constituting it, what is that *leaving* to be which is a part of the offence? It cannot be the mere passing from or through Canada, for the statute says it must be the leaving of a *resident in Canada*, and that the leaving must be *by a subject of Her Majesty*; and it appears to me that all these facts, (1) that the party indicted is a *subject of Her Majesty*; (2) who at the time he left was a *resident in Canada*; and (3,) *that he left it with the intent, &c.*, are so mixed up, as is said in some of the cases, that all of them must be proved by the Crown.

It may be that very little is required to prove the fact of being a subject, but whatever will prove it must be shewn by the Crown.

There was evidence sufficient given to leave to the jury upon which they could have found all of these facts against the defendant; but they were not left to the jury, nor were they found upon by them. I refer more particularly to the *intent* not having been left to, nor found upon by, the jury, for I have more confidence upon that being an essential part of the crime than I have as to the other

matters before referred to, although I think they were all essential, because they are so connected and mixed that the one cannot be separated from the other.

I will just refer to the cases I before made extracts from : *Rez v. Horne*, Cowp. 683, and 1 Ch. Cr. Law. 229.

In *Steele v. Smith*, 1 B. & Ald. p. 99, per Bailey, J.: "I admit that where there is an exception so incorporated with the enacting clause that the one cannot be read without the other that the exception must be negatived." See also ante *Wells v. Iggulden*, 3 B. & C. 188, per Bayley and Holroyd, JJ.; *Spiers v. Parker*, 1 T. R. 141, per Mansfield, C. J.; *Simpson v. Ready*, 12 M. & W., per Alderson, B., at p. 740; *VanBoven's case*, 9 Q. B. 669, per Coleridge, J.; Arch. Cr. Pl. & Ev. 239.

Suppose the section of the Act, which declares that "Whosoever shoots at any person with intent to commit murder shall be guilty of felony," were worded in this way, "whosoever shoots at any person shall be guilty of felony, provided that the person who shoots at another so shoots at him with intent to commit murder;" the proviso would be so connected with the enacting clause, by reason of its being a component part of the offence that the proviso would be virtually incorporated with the enacting clause, and the prosecutor would be bound to aver in the indictment, as part of the description of the offence, that the shooting was done with intent to commit murder, as if the very words of the proviso were contained in the enacting clause. I refer also to Arch. on Criminal Pleading and Evidence, 10th ed., in cases where one statute creates the offence, and the later statute increases the punishment, or makes it a higher offence.

Is the present a case of that kind? The enacting clause, which declares what acts shall constitute the offence of bigamy, states nothing about intent. Then the proviso declares under certain circumstances the person for a bigamous marriage shall not be guilty of bigamy unless he leaves the country with the intent to commit the offence. The intent then is a material constituent of the offence in

that case: without it there is no offence. In *Regina v. Woodfall*, 5 Bur: at p. 2662, counsel for the defendant said: "A criminal motive goes to the construction of the offence, a criminal intention is its essence."

The English Acts contain nothing about intent which distinguishes them from our Act.

I am therefore of opinion it was incumbent upon the Crown to frame the indictment, as it was assumed the indictment was framed, by alleging the facts of the defendant being a British subject resident in Canada, and that he left the country *with intent* to commit the offence, and to prove at least the intent as part of the offence.

The burden of proof was on the Crown; for the mere fact of a subject who is married leaving the country and marrying again, while the first wife is living, is not unlawful or criminal. It is the intent with which the person left this country, that is, to marry again, and marrying in the foreign country, which make the act criminal.

It is, too, not a negative but an affirmative allegation, that the defendant left the country with a particular intent, and the affirmative should be established by the party making it: *Rex v. Turner*, 5 M. & S., at p. 211. As in my opinion the Crown had to aver and prove at least the intent, which was done in fact, but which was not left to the jury to find upon, nor in fact was it found by the jury, but I may say was in effect withdrawn from them, the defendant has not been rightfully convicted.

The third part of the case which I refer to is that the indictment is drawn in such a form that the double marriage is charged in the first count, and the rest of the charge is contained in the second count.

The first count of the indictment does not state the defendant "was a subject of Her Majesty resident in Canada, and that he left Canada with intent to commit the said offence." The form is taken from the Imperial Act, which does not say anything about intent.

If the intent is a material part of the offence, as I hold it to be, the first count cannot, if read alone, be a good count, which omits the intent.

Then will it answer to state the intent part of the offence, that is, the intent, &c., in the second count?

"The several counts in a declaration are for all purposes as distinct as if they were in separate declarations, and consequently they must contain all necessary allegations or the latter count must expressly refer to the former:" *Bac. Abr. Pleas & Pleading*, B. 1.

In *Roberts v. Taylor*, 1 C. B. 117, a declaration alleging the breaking and entering a dwelling house of the plaintiff, and also removing the plaintiff therefrom, and also, &c., was treated by the defendant as a declaration containing five several counts. See the case of *Tattersall v. Parkinson*, 16 M. & W. 752.

These cases shew how strictly each count is considered to be a separate cause of action. Formerly the statement that the defendant was indebted to the plaintiff in a specific sum for goods sold, and in a specific sum for work and labour, &c., was held to be several counts. But if the statement were that the defendant was indebted to the plaintiff in a specific sum for goods sold and for work and labour, &c., it was only one count.

If the words at the beginning of the second count, "and the jurors upon their oath aforesaid do further present," can be read as a mere continuance of the first count, the whole indictment is regular and maintainable. Or, if the statements in the second count do so refer to and incorporate the averments of the first count, the second count may be sustained; and I think that may be done, for the second count alleges that at the time of *the marriage of the said James Pierce to the said Ella Amey as aforesaid*, [that plainly refers to the first count.] Then afterwards it is said in the second count, with relation to the defendant leaving Canada with intent to commit the same offence, to wit, the marrying of Ella Amey.

In that case the two counts will be read together as containing the whole circumstances and particulars of the offence, and this objection will be got over.

The fourth part of the case relates to the sufficiency of the indictment with respect to the offence as set out. The proviso says the Act shall not apply to any other person "than a subject resident in Canada and leaving with intent to commit the offence," while the second count alleges that the defendant, *at the time of the second marriage*, "was a subject and resident in Canada, and had shortly previous thereto left Canada with intent to commit the said offence."

That does not shew the defendant was a subject *before or at the time of his leaving Canada, &c.*, and he might have been a subject by naturalization only at the time stated in the indictment. The defendant is not therefore charged with any offence against the statute; for his being "at the time of the marriage with Ella Amey, a British subject," is not what the statute provides for; but his being a subject resident here, and leaving this with intent, to marry. The indictment is manifestly a bad indictment and it was not amended.

What can now be done with it? My learned brothers think we cannot treat the trial as a nullity under the 32 & 33 Vic., ch. 29, sec. 80. I think we can, but I yield to their opinion.

The same Act also provides, sec. 32, that "Every objection to any indictment for any defect apparent on the face thereof must be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded and not afterwards; and every Court before which any such objection is taken may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the Court or other person, and thereupon the trial shall proceed as if no such defect had appeared; and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer or amended under the authority of the Act."

It is a singular provision when read in connection with section 78, which declares that about sixteen *formal defects* shall be cured after verdict.

It may be that this objection may still be open to be taken by writ of error, for section 80 does not in terms take it away. It enacts: "No writ of error shall be allowed in any criminal case unless it be founded on some question of law, which could not have been reserved, or which the Judge presiding at the trial refused to reserve for the consideration of the Court having jurisdiction in such cases; but nothing in this section shall be construed to prevent the subsequent trial of the offender for the same offence in any case where the conviction is declared bad for any cause which makes the former trial a nullity, so that there was no lawful trial in the case."

The presiding Judge at the trial may, by C. S. U. C. ch. 112, "reserve any question of law which arose on the trial." Could the validity of this indictment have been reserved by the Judge at the trial?

If the defendant had demurred and the Judge overruled this demurrer, it would have been a ground for a writ of error rather than for a case reserved.

If the indictment be open to demurrer, but the defect has not been noticed till after plea pleaded, could the Judge reserve the question whether this indictment was sufficient or not? I think not; for if the defendant is entitled to relief it would be by writ of error. But would the *defendant* have even that remedy? For the Act says that "any defect apparent on the face of the indictment *must* be taken by demurrer or motion to quash before the defendant has pleaded, *and not afterwards*;" and further, that the Court, before which "any such objection is taken, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no such defect had appeared."

In this case the averment that the defendant, *at the time of the second marriage*, was a subject of Her Majesty, &c., seems very like an express allegation that he was *not* a subject of Her Majesty at the time he left Canada; and if he left Canada, and if he were not then a subject, he should not, and notwithstanding the statute could not, in my

opinion, be lawfully convicted. Upon the evidence, however, even that defect might have been amended, for it would have been according to the fact, and the power of amendment is almost unlimited.

If the enactment, that *every objection* to an indictment, *for any defect apparent on the face thereof, must* be taken by demurrer or notice to quash *before plea* and *not afterwards, &c.*, then there is no such thing as objecting to such an indictment, however defective, after plea, unless it be by error or by holding the trial to have been a nullity according to the 80th section; and an indictment charging that the defendant murdered A. might be tried and the defendant convicted although it did not state the act had been done "feloniously, wilfully, and of his malice aforethought;" and if the indictment charged that the defendant did kill and slay A., omitting that the act was done "wilfully and feloniously," the defendant might still be convicted of manslaughter; and he might also be convicted of burglary if the indictment charged merely that the prisoner did break into the dwelling house of A. in the night time, omitting that the act was done "feloniously, with intent to commit a felony therein." I think in these cases the trial would be a nullity or the Crown could bring error.

The English Act 14 & 15 Vic. ch. 100, sec. 25, provides that "every objection to any indictment for any *formal* defect apparent on the face of the indictment," &c.: the rest is the same as ours. Our Act applies to any defect, the English Act to any *formal* defect. See *Sill v. The Queen*, 1 E. & B. 553, and *Bradlaugh v. The Queen*, 3 Q. B. D. 607, as to *formal* defects.

If our statute is held to cover *every* defect apparent on the face of the indictment which has not been taken before plea, it must be because every allegation necessary to constitute the offence is to be presumed to have been duly made, if the *evidence* given of such allegations is sufficient to prove them, and if such evidence has been found by the jury; or it must be because the allegations

omitted, not having been taken by demurrer or motion to quash, are no longer necessary to be proved. By giving effect to the widest construction which can properly be placed upon the statute, it must be subject to the qualification that enough is charged against the defendant which shews that the criminal offence assumed to have been committed is contained in the indictment; and, construing the statute in that way, it appears to me that as the indictment should have charged that the defendant was a British subject resident in Canada, and that he left Canada [being then of course a British subject] with intent to commit the second bigamous marriage in the other country; and as it was incumbent on the Crown to prove the intent, at least, and, I think, the other matters as well, it cannot be said a criminal offence is stated which alleges only that at the time of the second marriage the defendant was a subject of Her Majesty, for that shews that when he left Canada the defendant was not a British subject, and was not within the enactment of the statute.

The indictment is so defective that every word of it although proved, or if the defendant had pleaded guilty to it, would not have established that he had committed a criminal offence.

I think the Act of 1869, section 32, although the language of it is so very wide, should not be construed so as to assume or presume a criminal offence has been stated against the defendant, when none has been stated. This is not a case defectively stated, but the statement of a defective case, and the general rule of pleading is, that no presumption can be made to support a defective case when such presumption is negatived and at variance with any material statement in the record: 1 *Chitty* on Pleading, 6th ed., 681, and the cases referred to, and 1 *Saund.* 228, note (1).

I cannot say that an indictment which does not charge an offence can be a valid indictment in law; and particularly this indictment, which shews the defendant could not possibly be convicted of an offence when he was not a

British subject at the time he left Canada; and therefore he could not possibly have left Canada with any criminal intent against the statute. The defendant is entitled to the benefit of this objection.

I am of opinion this objection might have been got rid of by holding the verdict to be a nullity. My learned brothers do not so think, as that would be placing the defendant again in jeopardy. We are all of opinion the indictment as framed shews no offence was committed by the defendant. Because therefore it appears to us that the defendant may have been, and may be presumed to have been, prejudiced by the ruling upon the cross-examination before mentioned, and because the ruling of the learned Judge, that all the matters contained in the proviso of the statute were matters which the defendant was in law bound to negative, and the intent, &c., at least was a matter which it was for the Crown to prove (and I think the other matters as well), and because the intent was not left to the jury, nor found upon by them, and because the indictment does not charge any crime against the defendant as above stated, we are of opinion the question submitted to us, "Whether upon the facts stated in the case reserved, as they appear in the evidence, the prisoner could be legally convicted of the offence charged in the indictment," must be answered, and accordingly our answer is that the defendant could not be legally convicted of the matters stating the alleged offence, for that he married the said Ella Amey in manner and form as set out, the first wife of the defendant being then living. We therefore reverse the said conviction, and order that in our judgment the defendant ought not to have been convicted and that he do go thereof without day. I agree in this order with respect to the exclusion of the evidence, but I am not quite satisfied that as to the other objections the conviction should be vacated only, so that as to them the judgment should be to declare the trial a nullity. I am not, however, so assured on the point as to differ from my learned brothers. That, however, is of little consequence, for

if the defendant is to go without day upon any one ground, he cannot be prosecuted again for this offence, although the trial may be a nullity as to the other points of the case.

The general judgment, therefore, in part of which I concur with some doubt, is, that the defendant do go thereof without day.

ARMOUR, J.—The second marriage was contracted elsewhere than in Canada, and it was incumbent therefore upon the Crown to charge and prove that the prisoner was at the time of the commission of the offence a subject of Her Majesty resident in Canada who had left the same with intent to commit the offence.

I am not of the opinion that there was any evidence to support such a charge.

There was some evidence, though slight, that he was a subject of Her Majesty, but no evidence that he was at the time of the commission of the offence resident in Canada, and no evidence that being such, he had left Canada with intent to commit the offence.

The learned Judge directed the jury that if they believed that the prisoner and the person alleged to be his wife were married in Toronto, and that the prisoner was married to the other person in Detroit, that they must find the prisoner guilty of bigamy.

This was, in my opinion, an erroneous direction, and the jury ought to have been told that in addition to finding that both the marriages had taken place, they must also find that the prisoner was at the time of the commission of the offence a subject of Her Majesty resident in Canada, and that he had left Canada with intent to commit the offence, before they could find him guilty.

The conviction should therefore, in my opinion, be quashed.

O'CONNOR, J.—The proviso, as far as it relates to this case, is clumsily expressed, and no less than three of the Judges at Osgoode Hall concur in the interpretation of it expres-

sed by the learned Judge who tried the case; and at one time I was somewhat impressed by some of the arguments used in support of that interpretation; but a careful perusal and analysis of the paragraph have quite convinced me it is founded upon and deduced from an erroneous construction of the terms of the paragraph in question.

The second marriage contracted elsewhere than in Canada would not constitute the crime or offence called bigamy under the common law.

At common law it is not an offence; but our statute makes it an offence, not for a foreigner, an alien, resident in Canada, but for a subject of Her Majesty resident in Canada, to contract the second marriage elsewhere than in Canada, he having left Canada, the place of his residence, with intent to contract that second marriage; that is, with intent to commit the offence. The intent formed in Canada and the departure from Canada, with the intent to put the design implied in execution—in *actu*, elsewhere than in Canada, are of the essence, are elements and necessary constituents of the offence under the statute.

Then, as I read and understand the clause and proviso in question, an Englishman may leave his wife in England, go to the United States of America, or to any other foreign country, and there, during the lifetime of his wife, contract a second marriage, and then come to Canada without becoming amenable to a charge for bigamy under our statute, although he is and always was a subject of Her Majesty. And a foreigner, that is, an alien, though resident in Canada and married, his wife being in Canada or elsewhere, may leave Canada, with or without intent to contract a second marriage, and during the lifetime of his wife contract such second marriage elsewhere than in Canada, and then return to Canada without incurring the penalty or rendering himself amenable under the statute for the crime of bigamy. In fact our Legislature, keeping in view constitutional law and usage, and the law of nations, did not assume to exercise jurisdiction over an alien, though a resident of Canada, for an act done by him elsewhere than

in Canada ; for, besides reasons of state, although that act, if done in Canada, would be a crime, it may not be so in that country, elsewhere than in Canada, wherein it was done ; or, if an offence or crime there, he might be liable to punishment here and there also.

In the case supposed of the Englishman, not being a resident of Canada, who contracted the second marriage before coming to Canada, he was not at the time of contracting the second marriage subject to the laws of Canada or jurisdiction of the Courts of Canada. Hence, residence in, and leaving Canada with the intent, was made an element of the offence. Another class of persons may be supposed, to whom the statute would not apply ; that is, who would be, by the proviso, excepted from the operation of the clause. For instance, a subject of Her Majesty, resident in Canada, leaving Canada, with intent, not of contracting a second marriage elsewhere, but only of entering into and prosecuting some specific business, say in some State of the United States, and taking his wife with him, or, as has often been done, leaving her in Canada until he has procured a home for her at the place to which he is going, but while there, following and carrying out his intention as regards business, and making the acquaintance of a woman, theretofore unknown to him, and afterwards forming the design and intent, not before then conceived, to marry and then marrying that woman there, his wife still living, afterwards returning to Canada, cannot, under such circumstances, be legally prosecuted and convicted of bigamy under the statute. The effect of the statute is, that on the conditions stated, as regards a subject of Her Majesty resident in Canada, the place where the second marriage was contracted is made immaterial.

The conditions are four ; one, a mental or subjective fact, the others, external or objective facts. First, the offender must be a subject of Her Majesty ; 2nd, resident in Canada ; 3rd, the intent conceived and formed in Canada of leaving Canada to commit the offence elsewhere ; 4th, the fact that

he left Canada with that intent to commit, and did commit the offence elsewhere.

The expression, "any other than," is a term of exception, for which the word "except" may be substituted without altering the sense.

Making that substitution the proviso would read, Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in Canada by any (person) except a subject of Her Majesty resident in Canada, and leaving the same (*i. e.*, Canada,) with intent to commit the offence.

The meaning, then, is simply, that the section *does* apply to a second marriage contracted elsewhere than in Canada by a subject of Her Majesty resident in Canada who leaves Canada with intent to commit the offence; but it does *not* apply to any other than such a subject.

The learned Judge, in his charge to the jury, as reported, after stating the proviso, said:—"You can see the object of that is this. Supposing that an American citizen, who lived in Canada for a short time and had withdrawn to the United States to live there, contracted marriage, our laws are to regulate the subjects of Her Majesty, but are not intended to extend to the subjects of any other Government not resident in Canada; and this provision is made by way of exception; so that a person who is not a subject of Her Majesty and who goes to the States, or being a citizen of the United States and there marries according to their laws, this clause is not intended to operate against such persons to convict them of bigamy if they are found within our jurisdiction."

This statement is somewhat confused, a quality which I am inclined to attribute to inaccuracy in the report, rather than to the expression of the Judge; but, be that as it may, it conveys clearly what is, as I conceive, an erroneous interpretation of the proviso.

It has been argued by counsel for the accused that it lay on the Crown to prove that he was a subject of Her Majesty resident in Canada, and that he left Canada with

intent to commit the offence; while on the part of the Crown that was denied; and it was urged, on the contrary, that it was matter of defence, proof of which lay on the accused, because it was matter of exemption given by the proviso. The Crown's reply assumes that the case in question falls within the exemption negatively given by the proviso, which, however, is not the case, and the reply is therefore fallacious. The proviso relates only to second marriages, contracted elsewhere than in Canada, and with reference thereto; it, by negation, primarily and expressly excludes and exempts, as I have shewn, two classes of persons: aliens, whether resident or not resident in Canada, and subjects of Her Majesty not resident in Canada before the second marriage was contracted.

As regards these two classes, it may be that the alien-ship in the one case, and the prior non-residence in Canada in the other case, is matter of defence proof of which lies on the accused. The authorities on this point are neither clear nor quite consistent with each other. But it is not necessary in this case to decide that question; firstly, because in my view of the proviso that question does not arise; and secondly, because the way in which the case was left to the jury renders it unnecessary to consider the question.

This case, though of the class mentioned in the proviso, does not come within the exemption or exclusion of the proviso; that is, it is not one of a class of cases excluded from the operation of the enacting clause, but is, on the contrary, reserved from the operation of the proviso, and is one of the only class of cases left to the operation of the clause in relation to second marriages contracted elsewhere than in Canada.

It is therefore contained in the enacting clause, and is merely limited in its width or extension by the exclusion of the the two classes removed from it by the negative and exempting force of the proviso. It is the universal of the enacting clause reduced to a particular proposition by the excluding force of the proviso, and is only stated in the

proviso in its limited form for the purpose of better distinguishing the excluded classes from it. It is in fact as if the clause should be read, Every person resident in Canada and being lawfully married, who contracts a second marriage in Canada during the life of the former husband or wife ; and every subject of Her Majesty resident in Canada, and being so lawfully married, who contracts a second marriage elsewhere than in Canada, and who left Canada with intent to commit the said offence, is guilty of felony and shall be liable, &c.

It does not then fall within any of the authorities cited on the argument, nor within any other authority with which I am acquainted. The Crown must allege and prove the place of the offence, and when it is alleged and proved that the offence was committed elsewhere than in Canada, I think that the Crown is bound to go further and prove that the accused is a subject of Her Majesty, that is, give *prima facie* evidence of that fact, that he was a resident of Canada and left Canada with the intent to commit the offence.

In this case I think there was ample evidence of these several facts to go to a jury, and that if the law of the case had been correctly stated to the jury the conviction could not properly be objected to or disturbed.

The learned Judge did, indeed, tell the jury that there was evidence, *prima facie*, to satisfy them that the accused was a subject of Her Majesty resident in Canada, that he was a resident in Canada at the time of his marriage, that being a resident here he must be taken *prima facie* as a subject of Her Majesty ; but he omitted to tell them that they ought to be satisfied that he had left Canada with intent to commit the offence, and that they should so find before convicting. This omission is, in my opinion, fatal to the verdict. Then he told the jury, "as a matter of law it would be part of the defence of the prisoner to shew that the second marriage was contracted by him, not being a subject of Her Majesty ; in other words, that he was a subject of a foreign country." If my view of the statute

is, as I conceive it to be, correct, this direction was, of course, erroneous. Such a defence was not open to him ; it was not his case, but the contradictory thereof.

Then the learned Judge continued : " On these grounds I would direct you, as a matter of law, if you believe these two persons were married in Toronto, and the prisoner was married to that other person in Detroit, that you must find him guilty of bigamy." Here the question of a subject resident in Canada, leaving the same with intent to commit the offence, was ignored, was not left to the jury, and the verdict was rendered, it is fair to assume, without regard thereto.

If the learned Judge was right in his construction and interpretation of the clause and proviso of the statute, his charge to the jury was substantially right, and the prisoner was properly convicted. It depends entirely on that. But if the Judge's exposition of the law was erroneous, as I think it was, the conviction is illegal, and ought not to stand. The conviction must therefore be quashed.

Conviction quashed.

Since judgment given the Chief Justice has referred to the case of *Regina v. Green*, D. & B. 113, 2 Jur. N. S. 1146, shewing a case in which the former verdict was held to be a nullity, and that, although the Judge could, at the trial, have amended the indictment, he was not bound to do so.—*REP.*

[QUEEN'S BENCH DIVISION.]

DUNKIN V. COCKBURN.

*Trespass—Free Grant and Homestead Act (R. S. O. ch. 24)—Locatee—
Patentee—Reservation—43 Vic. ch. 4 (O).*

Held, [reversing the judgment of ROSZ, J., at the trial,] that a patentee under the Free Grant and Homestead (Act R. S. O. ch. 24,) who was located before, but whose patent did not issue until after the passing of the Act 43 Vic. ch. 4 (O.) is entitled to his land freed from all reservations and exceptions but those specially contained in the patent, and from the burden and easement of having roads, &c., made upon his land, and timber and logs hauled over it, by any licensee of a timber limit.

THIS was an action for cutting and slashing the timber and trees on lot 15 in the 4th concession of McMurrich, and making a road upon and across the lot, and hauling timber and logs along the road, and for other wrongs specially set out.

Defence :

1. A denial of the trespasses charged.
2. That he, the defendant, was the holder of a timber license over part of the township lying westward of the lot, and as such holder had the right, under the statutes and Orders and Regulations in Council in that behalf, to haul his timber or logs over the uncleared portion of land located as a free grant or purchased as in the statutes, Orders and Regulations provided ; and to make such roads thereon as might be necessary, doing no unnecessary damage ; and to use all slides, portages, roads or other works previously constructed or existing on any lands so located or sold ; and the right of access to and free use of all streams and lakes theretofore used, or that might be necessary for the passage of timber or logs, and all land necessary for such works as in and by the said statutes and Orders and Regulations in Council were reserved.
3. That the said lot No. 15, in the 4th concession of McMurrich, was land located as a free grant, or purchased as in the said statutes, Orders and Regulations provided, and

if any timber or logs were hauled over the said lot, or any roads made thereon [all which the defendant denied] these acts were done under the authority of the said statutes, &c., and the defendant pleaded and claimed the benefit of the said statutes, &c., in particular R. S. O. ch. 24, and the amending Act, 43 Vic. ch. 4 (O.), and the Orders and Regulations in Council, dated 27th May, 1869, and 23rd July, 1875, respectively.

There were five other pleas pleaded, all of which the defendant's counsel withdrew at the close of the trial, the parties having agreed to rest the case upon the legal right of the defendant to do the acts complained of, and having agreed to the damages being stated at \$100 for the plaintiff, in case the plaintiff obtained the judgment of the Court.

Issue.

The case was tried at the last Assizes at Barrie before Rose, J.

The learned Judge stated his reasons for ruling in favour of the defendant as follow: "By the R. S. O. ch. 24, sec. 8, the patent issues for land *located*. Had it not been for the express provision in sec. 10, sub-sec. 2, of that Act, that the trees remaining on the land at the time of the issue of the patent should pass to the patentee, it would seem reasonable that the words in sec. 10, excepting pine trees from the location, would prevent the pine trees passing to the patentee, because only that which was located would pass under the patent. Section 4 of the Order in Council, dated May 27, 1869, expressly reserves to the Crown the right to make colonization roads on any land located or sold. Section 5 gives to the holders of timber licenses the right to haul timber over any uncleared portion of any land located as a free grant, and to make such roads thereon as may be necessary for such purpose, 'and all land necessary for such works is reserved.' If such land is reserved from the location, then, as I read the statute, it would not pass to the patentee, or to the locatee when he gets his patent, because he gets his patent for that only

for which he is located. If it is excepted from the patent there seems to be no room for argument. By sec. 16 the form of the patent is provided for, and all that is required by the Act is that the patent shall state in the body the name of the original locatee, the date of the location, and that the patent is issued under the authority of the Act. There is no requirement by the statute, prior to the amendment to which I have referred, that any reservation shall appear upon the face of the patent.

When the 43 Vic., ch. 4, (O.) was passed it provided expressly that the patent should state upon the face of it that it contained a reservation of all pine trees standing on the land. But for that enactment it would seem to have been unnecessary that any such reservation should appear in the patent. The patent, 14th June, 1883, was granted to the locatee subsequent to the amendment by the 43 Vic. It contains the reservation of pine trees, at least the reservation contained in sec. 10 of the R. S. O., and also contains a reservation not found in the Act at all. I would judge that it was unnecessary, under the statute, for it to have contained a reservation of gold and silver and things that did not pass to the locatee, and hence not to the patentee; but it does contain a reservation of gold and silver, and also a further reservation which, so far as I have noted, does not appear in the Act, namely, the free use of and passage over navigable waters. It seems to me that the Order-in-Council either reserved from the location the land necessary for the roads, and that the locatee taking his grant for that for which he was located did not take such land, or that it is an express declaration of the reservation of the land from the patent. In either view it seems to me the plaintiff's contention cannot be sustained, and that the defendant had the right under that section of the Order-in-Council to pass over the lands subsequent to the patent. It is also observable that in the Act, although the word *locatee* is defined by sec. 5, the same word, *locatee*, is used with reference to lands both prior and subsequent to the

patent. The reading of the Act to which I have given effect would, I think, prevent the Crown constructing colonization roads over lands after they are patented, (as there is no express reservation) although the Order-in-Council would seem to indicate that they intended to reserve that right; but whether that be so or not I rely upon the words, 'All land necessary for such works is reserved.' I have looked at the cases referred to and I find no assistance from them. The agreement of the parties with reference to the motion appears upon the notes.

If the ruling is sustained, the judgment will stand for the defendant with costs. If the ruling is not sustained, the judgment will be for the plaintiff for \$100 agreed upon with costs—full costs of suit"

At the Michaelmas Sittings last the case was argued, on notice of motion, to set aside this judgment and enter it for the plaintiff, by *J. K. Kerr, Q.C.*, and *John A. Paterson*, in support of the motion.

The 4th section of the Order-in-Council relied upon by the defendant does not apply to lands patented, but only to "any land located as a free grant or purchased as before provided."

The land was located by the plaintiff in 1877, and patented to him in June, 1883, and the trespasses complained of were committed in January and February, 1886.

The pine timber was reserved to the Crown by the 31 Vic. ch. 8, sec. 10—see R. S. O. ch. 24, sec. 10—and under that Act the pine timber was reserved by the patent, but in the plaintiff's patent of June, 1883, the pine timber is not reserved, because the plaintiff's location ticket was given in 1877, and before the 43 Vic. ch. 4; and by sections 2 and 3 of that Act the enactment is that all pine trees growing or being upon any land located or sold within the limits of the free grant territory, "after the passing of this Act, * * shall be considered as reserved from said location, and shall be the property of Her Majesty, &c.," and "the patents for all lands hereafter located or

sold shall contain a reservation of all pine trees standing or being on such lands, which pine trees shall continue to be the property of Her Majesty."

McCarthy, Q.C., and Falconbridge, Q.C., contra. The 43 Vic. ch. 4, sec. 3, (O.) is a protection to the defendant for all he has done, and which is complained of. *Locate* and *locatee* are terms applicable as well to one who is still a locatee, as to a locatee who has become a patentee. See American Digests as to *locate* and *locatee*. The patent is granted "under the authority of the Free Grant and Homestead Acts," and is granted to him as *located* under the said Act, and as a free grant settler.

Paterson, in reply. The term *locatee* is never used after the patent with respect to one who was located: *Canada Permanent Loan and Savings Co. v. Taylor*, 31 C. P. 41.

March 11, 1887. WILSON, C. J.—The plaintiff is a free grant settler and the patentee in fee from the Crown of lot No. 15 in the 4th concession of the township of McMurrich, containing 100 acres, granted to him on the 14th of June, 1883, for which land the patent declares the plaintiff was located under the said Act on the 11th of May, 1877, which grant, besides being subject to the reservation to the Crown, and to the exception of all gold * * or other mines or minerals, is subject to the Crown to "the free use, passage, and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found on or under or be flowing through or upon any part of the said land."

On the 28th February, 1868, 31 Vic. ch. 8, (O.) the Free Grant and Homestead Act was passed, sec. 10 of which was contained in the R. S. O. ch. 24. Under that section in the case of *Anderson v. Muskoka Mill and Lumber Co.*, 27 C. P. 180, it was decided that a license to cut timber on lands comprised in the Free Grant and Homestead Act, 31 Vic. ch. 8, (O.), and located under that Act, did not enable the licensee to cut timber after the issue of the patent, although during the currency of the license year, for that

Act expressly declared that "all trees remaining on the land at the time the said patent issues shall pass to the patentee."

In consequence of that decision it is said sec. 10 of the Act was repealed by the 43 Vic. ch. 4, (O.) and the following enactments were substituted therefor. Perhaps it was in consequence of that decision the 11th, 12th and 13th sections of the R. S. O. ch. 24 were also passed.

By the Act of 1880, sec. 2, "All pine trees growing or being upon any land located or sold within the limits of the free grant territory after the passing of this Act, and all gold, &c., shall be considered as reserved from such location, and shall be the property of Her Majesty, except that the locates or purchaser, or those claiming under them, may cut and use such pine trees as may be necessary for the purpose of building and fencing on the land so located, and may also cut and dispose of all trees required to be removed in the actual clearing of said land for cultivation; but no pine trees [except for the necessary building and fencing aforesaid] shall be cut beyond the limit of such actual clearing; and all pine trees cut in the process of clearing and disposed of shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw logs."

Sec. 3. "The patents for all lands hereafter located or sold as aforesaid shall contain a reservation of all pine trees standing or being on said lands, which pine trees shall continue to be the property of Her Majesty; and any person now or hereafter holding a license to cut timber or saw logs on such lands may at all times during the continuance of such license enter upon the uncleared portion of any such lands and cut and remove such trees, and make all necessary roads for that purpose, and for the purpose of hauling in supplies, doing no unnecessary damage thereby; but the patentees, or those claiming under them, may cut and use such trees as may be necessary for the purpose of building and fencing on the lands so patented, and may also cut and dispose of all trees required to be removed in

actually clearing the said land for cultivation ; but no pine trees [except for the said necessary building and fencing aforesaid] shall be cut beyond the limit of such actual clearing ; and all pine trees so cut and disposed of shall be subject to the payment of the same dues as are at the time payable by the holders of licenses to cut timber or saw logs."

By the R. S. O., ch. 24, sec. 11, it is enacted that the Commissioner of Crown Lands had since the passing of the Consol. Stat. Can. ch. 23, and now has full authority to grant licenses to cut timber on lots located or sold under the Free Grant and Homestead Act of 1868.

Sec. 12. "Every license heretofore issued, whether the same has expired, or is still current under any such license which may be hereafter issued to cut timber within the limits of any territory appropriated as free grant territory under the Free Grant and Homestead Act 1868, shall be deemed to have been and to be good and valid for the period for which the same were or may be granted, notwithstanding the patent for lands included therein may in the meantime have been issued ; and every such license shall be taken to have conferred and to confer upon the holder thereof the right to cut timber on the lands included therein until its expiration, whether such lands were or are located or sold, subject, however, to such conditions, regulations, and restrictions specially applicable to the free grant territory, or to the said lots sold or located as may have been heretofore or may be hereafter made by the Lieutenant-Governor in Council in respect of the timber dues or otherwise ; and subject also to such exceptions or restrictions as may be contained in any such license ; provided that no license shall confer the right to cut any other than pine timber upon lands which have been located or sold in the said territory prior to the date of such license, unless the location or sale shall have been cancelled."

The only parts of the 23rd Vic. ch. 2, which are applicable to free grants are sections 13, 16, 17. Under section

13 the Governor in Council may appropriate any public lands as free grants to actual settlers in the vicinity of any public roads opened through the said lands in any new settlements, under such regulations as shall from time to time be made by Order-in-Council; but no free grant shall exceed 100 acres; and by sections 16 and 17 a license of occupation may issue, among others, to any person who has been *located on any public lands as a free grant*; and such person may maintain actions against trespassers to such lands as effectually as he could do under a patent from the Crown.

Timber licenses are granted under R. S. O. ch 26, to cut timber on the ungranted lands of the Crown, subject to such conditions, regulations and restrictions as may from time to time be established by the Lieutenant-Governor in Council. The license shall not be granted for longer than a year, and it shall vest in the licensee the exclusive possession of the lands described, subject to such regulations and restrictions as may be established; and it shall vest also in him all rights of property in all trees, timber and lumber cut within the limits during the license. Under the R. S. O. ch. 24, the Lieutenant Governor in Council may appropriate any public lands suitable for settlement and cultivation, not being mineral or pine timber land, as free grants to actual settlers under such regulations as shall from time to time be made by Order-in-Council not inconsistent with the provisions of this Act, sec. 3; and the person to whom any land may be allotted for a free grant, shall be considered as located for land within the meaning of the Act, "and is hereinafter called the locatee thereof": sec 5.

The land of the plaintiff was located in June, 1877, and therefore under the R. S. O. ch. 24. At that time, that is in 1877, the enactment in section 10 as well as the amending Act 43 Vic. ch. 4, (O.) enacted that all pine trees growing or being on land sold within the free grant or territory, "shall be considered as reserved from said location, and shall be the property of Her Majesty."

The difference between the two enactments is that the 43 Vic. ch. 4, sec. 2, (O.) amending section 10 of the Revised Statutes, ch. 24, applies only to free grant land located or sold *after* the passing of the Act of 1880; and the land in question was located *before* the passing of that Act.

The Act of 1880, sec. 3, applies also only to patents for lands *hereafter* located or sold and does not extend to this land.

It may be that lands before they are located or sold, although not bound by the 2nd section of the Act of 1880, are nevertheless bound by section 11 of the R. S. O. ch. 24, which declares that the Commissioner of Crown Lands ever since the Act of 1868 had under the Consol. Stat. Can. ch. 23, and now has under R. S. O. ch. 26, full authority to grant licenses to cut timber on lots located or sold under the Free Grant and Homestead Act of 1868, or under this Act, and the R. S. O. ch. 26, section 4, gives power to the Commissioner to grant licenses to cut timber on the *ungranted* lands of the Crown.

If, therefore, notwithstanding the restrictive words of the Act of 1880, any land located or sold *after the passing of this Act*, the Crown had still the right, according to the R. S. O., ch. 24, sec. 11, to grant licenses to cut timber on lands located or sold under the Acts therein referred to, that would apply to lands before patent only, and that is sufficient for this case; for the C. S. C., ch. 23, gave the power to the licensee to cut timber only on the *ungranted* lands of the Crown, as does the R. S. O., ch. 26; and the Act of 1868, of Ontario, as it originally stood, limited the license to cut to the period before the issuing of the patent; and, as amended by the Act of 1880, the right to cut is only upon lands located or sold *after* the passing of that Act; and all that the declaratory sec. 11 of the R. S. O., ch. 24, claims is that the Crown had, and has under all or any of these Acts, the right to grant licenses to cut timber on the free grant lands located or sold—that is, in effect, upon the *ungranted* lands of the Crown—and that is consistent with the enactment of 1877, R. S. O., ch. 24,

sec. 12, that no other or greater right was ever given to or claimed by the Crown before the passing of that Act ; and that Act, by enacting in sec. 3 that "patents for lands *hereafter* located, as aforesaid, shall contain a reservation of all pine trees standing or being on said lands, which pine trees shall continue to be the property of Her Majesty," does no more than declare that the pine trees on *such* lands shall, after the passing of that Act, be the property of Her Majesty.

So far, then, none of the Statutes do, as respects this land, which was located before the passing of the Act of 1877, reserve the pine timber upon it to the Crown, or make it Crown property after the issuing of the patent, and the patent in this case, in accordance with these enactments, does not reserve the pine timber to the Crown.

The Act of 1877, sec. 2, confirms the opinion that the license to cut was up to that time not grantable or exerciseable upon patented lands ; and that the pine trees after the issue of the patent expressly by the Act of 1868 was *pro tanto* a revocation of the license ; but by the Act of 1877 the issue of the patent does not revoke the license, but the license granted before the patent terminates, as respects such patented land, with the year for which license is granted.

The 5th section of the Order-in-Council, made on the 27th day of May, 1869, is also in favour of that construction of the Statute, which states :

"All pine trees growing or being upon any land *hereafter* located as a free grant under the Act, or sold under the preceding regulations, shall be subject to any timber license in force at the time of such location or sale, or granted within five years subsequently thereto, and may at any time before the issue of the patent for such land be cut and removed under the authority of any such timber license while lawfully in force."

It is of no consequence whether that section of the Order-in-Council is consistent with the Act or not : the reference to it is merely to shew that lands when patented were freed from the operation of timber licenses.

The defendant justifies under the 4th section of the same Order-in-Council. It declares that

“ Holders of timber licenses, their servants and agents, are to have the right to haul their timber or logs over the uncleared portion of any land located as a free grant, or purchased as before provided, and to make such roads thereon as may be necessary for that purpose, doing no unnecessary damage, and to use all slides, portages, roads or other works previously constructed or existing on any land so located or sold, and the right of access to and free use of all streams and lakes theretofore used or that may be necessary for the passage of timber or logs; and all land necessary for such purpose is reserved.”

The question is, Is that section of the Order-in-Council consistent with the provisions of the Act R. S. O. ch. 24, sec. 3? If it is not it is not a valid order. Does it apply to patented land? The whole spirit of the legislation before referred to is against such a construction. Besides, “the land located or sold” are the terms used to describe the free grantlands before patent; and the statement that the land necessary for the work is reserved may be used with correctness while the title is in the Crown, but not so when the title by patent has passed to the grantee.

If the reservation is to be treated as not applying to the *land*, but to the *right* only to make roads, &c., and to use them for the temporary purpose of hauling the logs and timber, &c., leaving the land the property of the locatee, subject to the easements it is subjected to for the benefit of the licensee of the right to take the timber, it may be supported; but even so, it would not be valid as against a patentee, and it is only as respects the patentee the validity of this section of the Order-in-Council is now questioned, and, in my opinion, it cannot be supported as against the plaintiff, who is, and has for years been a patentee of the land not clogged with any such reservation, easement, or encumbrance. No doubt the licensee to cut timber on a lot must have the right to haul that timber from the lot; but is he to be subjected to have all the timber cut upon a license

covering twenty square miles hauled over his land, and roads made all over it for that purpose? The reservation may be too extensive and may be destructive of the whole purpose of the gift, grant, or location.

I am of opinion, in any case, that it does not apply to land patented, and so not to this plaintiff. That power may be exercised by the licensee against the locatee under the Act of 1880; but that which is not good under an Order-in-Council is valid, however hurtful it may be to the locatee, when sanctioned by a Statute.

The learned Judge gave judgment for the defendant upon the following ground :

The person located is located for the land. The pine trees are, among other things, reserved from this location, and are the property of Her Majesty. [If in place of a reservation of the pine trees it is called an exception, that would technically be correct. I shall, therefore, treat it as an exception, in which case the trees only would be reserved; the soil on which they grew would not pass, but such an interest in it as would be sufficient for the sustenance of the trees.]

Being *located* for the land, minus the trees, which the Act declares are the property of Her Majesty, the trees do not pass by the patent, but are still excepted, although the patent makes no exception of them, because in his opinion, as stated at the trial, the patent issued only for the land *located*, and it is therefore subject to all the terms and conditions the *location* was subject to, and the plaintiff cannot therefore maintain any action in respect of them, and being so excepted they are the property of the Crown, and the plaintiff can maintain no action in respect of them.

That is going too far in strict law, for the exception of all the pine trees by Her Majesty, excepting such as may be necessary for building and fencing on the land and in clearing the land for cultivation, being an exception out of an exception, the subject of the second exception passes to the locatee as parcel of the grant: Shep. Touch. 77; *Jenney*

v. *Brook*, 6 Q. B. 323 ; so that the locatee would, I presume, have the right, as against the licensee, to restrain him from cutting more pine trees than would leave sufficient for the locatee for the purpose of building, fencing and clearing on the land. That point however, did not arise at the trial. But besides that, for the reasons before given, on the general construction of the Acts and Order in Council, the plaintiff, as patentee, is entitled to his land freed from all reservations and exceptions but those specially contained in the patent, and to the burden and easement of having roads, &c., made upon his land, and timber and logs, &c., hauled over it by any licensee of a timber limit.

I am of opinion the plaintiff is entitled to judgment, and that the motion be made absolute to enter judgment for him, with \$100 damages and full costs of the action and of this motion.

ARMOUR and O'CONNOR, JJ., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

MICHAEL JORDAN, ET AL., EXECUTOR AND EXECUTRIX OF
THE LAST WILL AND TESTAMENT OF MICHAEL DUNN,
DECEASED, V. JAMES DUNN AND THE ONTARIO LOAN
AND DEBENTURE CO.

*Will—Construction—Conditions precedent and subsequent—Validity of—
Notice of contents of will.*

Testator, after granting to his wife a life estate in certain land, devised the same to his son, subject to the following conditions :

- “First, that he abstain totally from intoxicating liquors and card-playing.
- “Second, that he be kind and obedient to his mother.
- “Third, that he be known among his friends as an industrious man ten years after the death of his mother.
- “Should he fulfil these above mentioned conditions I give and devise to him to hold to his heirs and assigns forever the said lot. Should my son Michael not fill to the letter these conditions, then he shall have no right or title to the use of the said property during or after his mother's lifetime. But I will and bequeath said half lot to my grandson J., to hold to his heirs and assigns forever.”

Held, (1) that the three conditions were conditions precedent up to the time of the mother's death, and that conditions one and three were conditions subsequent for ten years after the mother's death.

- 2. That either the use of intoxicating liquors or the playing of cards would be a breach of the first condition.
- 3. That the first condition was valid and was not too vague or indefinite for trial or adjudication by the Court; and having been broken the son's title failed in so far as the condition was precedent, and was forfeited in so far as the condition was subsequent.

Scemle, that conditions two and three were valid, and not too vague or indefinite for trial or adjudication by the Court.

Held, also, that although the son was one of the heirs-at-law it was not necessary to shew that he had notice of the will or the conditions in it, for he had possession of the land as devisee under the will from his mother's death until his own.

THE statement of claim, so far as material to be set out, was :

James Dunn, by his last will and testament, dated the 22nd of April, 1870, devised as follows :

To his wife, for life, the use of the south half of lot 6, west of Oxford road, Gore of Downie.

To his son, Michael Dunn, after the death of his mother, the use of the said mentioned land, “subject to the following conditions, which I strictly desire to be observed and enforced :

First, that he abstain totally from intoxicating liquors and card-playing.

Secondly, that he be kind and obedient to his mother.

Thirdly, that he be known among his friends as an industrious man ten years after the death of his mother.

Should he fulfil these above mentioned conditions, I give and devise to him, to hold to his heirs and assigns forever, the said lot.

Should my son, Michael, not fill to the letter these conditions, then he shall have no right or title to the use of said property during or after his mother's lifetime, but I will and bequeath said half lot six to my grandson, James Dunn, to hold to his heirs and assigns forever."

The testator died on the 4th of January, 1872, without altering or revoking his will.

Michael Dunn, the son, died on the 10th of June, 1886, having first made his will, dated the 17th of May, 1886, whereby he devised the said land, lot six, west of the Oxford road, in the Gore of Downie, to the plaintiffs, upon trust, to sell the same and divide the proceeds thereof among his widow and three children.

James Dunn, the grandson of the original testator, died intestate, and without ever having been married, on the 18th of April, 1872.

The defendant, James Dunn, a son of the original testator and the father of James, the grandson mentioned in the will, claimed to be entitled, as heir-at-law of his son, to the said land.

Ann, the widow of the original testator, died on the 24th of May, 1881.

The plaintiffs were advised that the will of the said James Dunn was of doubtful construction, and that they could not with safety sell the said land and divide the proceeds thereof between the widow and children of the said Michael Dunn without the aid and sanction of this Court.

James Dunn, the defendant, mortgaged the land on the 7th of August, 1886, to his co-defendants, and registered the said mortgage, which land the plaintiffs claim under the will of the said Michael Dunn.

The plaintiffs claimed :

1. To have the rights and interests of all parties in and to the said land to be declared by this Court.

2. In the event of the land being declared to be the property of the plaintiffs upon the trusts aforesaid, that the Court should compel the defendant, James Dunn, to remove the mortgage from the land, and to restrain him from further encumbering the same or interfering with the same.

To pay the plaintiffs their costs, and for such other and further relief as to the Court might seem meet.

The statement of defence in substance was, so far as material, as follows :

The said Michael Dunn did not perform all or any of the said conditions mentioned in the will of the original testator attached to the devise to the said Michael of the land in question ; and he did not survive his mother for the period of ten years, his mother dying on the 24th of June, 1881, and Michael Dunn on the 10th of June, 1886.

That owing to the failure of Michael Dunn to perform the conditions of the will, and not surviving his mother for ten years, he never inherited any right to or interest in the land, and the land became and was the property of the grandson James Dunn, to whom it was devised ; and upon his death, on the 18th of April, 1872, it became the property of the defendant James Dunn, subject to the mortgage to his co-defendants, the Ontario Loan and Debenture Company.

That on the 14th of July, 1886, the plaintiff, in the original action, mortgaged the said land to the defendant, by counter claim, Lofton Edwin Dancey, who registered the same against the said land.

Counter-claim.

James Dunn, the plaintiff, by counter-claim alleged that the registration of the will of Michael Dunn and the mortgage to the said Dancey were a cloud on his title to the said land.

That the said James Dunn claimed he was entitled to the said land as absolute owner in fee under the will of the said James Dunn, the elder, as the heir-at-law of his son James Dunn.

Prayer : 1. To have his rights under the said will declared and established by the Court ; and that he be declared to be the owner of the said land in fee, subject to the mortgage to the said Loan and Debenture Company. 2. That the registration of the will of Michael Dunn and the mortgage to the said Dancey be ordered to be delivered up to be cancelled, and the registration thereof vacated. 3. That he be paid his costs.

Issue.

The action was tried at the last Fall Assizes held at Goderich, before O'Connor, J., without a jury.

At the close of the evidence for the defence *Mr. Garrow*, counsel for the plaintiffs, said: " We have not the slightest intention of contradicting anything that has been said."

" *Mr. Harding* : "The question of law is the whole question in the case."

The learned Judge : "I think so: the other matters would be extremely difficult to make out."

The law of the case was then argued at length by the respective Counsel, and the learned Judge gave judgment as follows :

" Michael took by the will a vested remainder in fee after his mother's death, subject to the conditions before stated. The first condition is wholly void ; the use of such liquors for medical purposes, and though prescribed by a physician and in case of emergency, are not even excepted. The condition against card-playing alone (there being no gambling) is not a valid one.

The two conditions are connected together, and if one part of the condition fails the whole fails: *Re Babcock*, 9 Grant, at p. 429.

The second condition is simply absurd. Michael could not well shew kindness to his mother after her death, and at all events the expression is too vague and uncertain.

The third condition is equally absurd, or nearly so. It could hardly be more vague and uncertain. How could it be ascertained who his friends were ? Who was to ascertain it ?

If the first condition, or either part of it is valid, it is a condition subsequent, and I think Michael was, under any circumstances, to take on the death of his mother, and ten years were allowed as a time of probation, during any of which he might begin to abstain totally from card playing. Why allow these ten years unless he was to have the whole period, and could fulfil the condition at any period in it? The meaning is that on his mother's death he would take the estate, subject to the condition, and with respect to the condition he was to have ten years probation.

Then follows a difficulty of inconsistency.

The will proceeds: 'Should my son Michael not fulfil to the letter these conditions then he shall have no right or title to the use of said property during or after his mother's lifetime, but I will, &c., to my [the testator's] grandson.'

The mother having a life estate Michael could not take during her lifetime. After her death he certainly took for at least ten years. The subsequent expression is inconsistent with the previous devise, and is therefore void.

But whatever may be now said of the condition, the devise to the grandson James Dunn has lapsed because he died before the tenant for life did, and while the conditional devise to him was only executory.

Before the abrogated law of primogeniture the rule prevailed that the heir-at-law could not be disinherited by a devise of the estate to another, unless he had notice of the devise: 2 *Jarman* on Wills, 13; *Theobald* on Wills, 451; *Doe d. Kenrick v. Lord Beauclerc*, 11 East 667; *Doe d. Taylor v. Crisp*, 8 A. & E., at p. 789. At that time there was but one male heir, and the rule seems to have been predicated on cases of such heirs, but female descendants or ascendants took equally as coparceners, and now both males and females take in cases of intestacy. Michael was one of four who were entitled to take if the father had died intestate, and I presume the rule as to notice would apply to him only *pro tanto*. There is no evidence Michael had

notice of the will, or at all events that he knew anything of the conditions. The lapse of the devise over to the grandson raises another question—what is there to divest Michael or his devisees of the estate at the end of ten years? But it is hardly necessary now to consider this. There is no evidence that Michael played cards in the sense in which I think it must have been intended by the testator. Two witnesses say they saw him play forty-fives and euchre, apparently on one or two occasions after his father's death, but when, where, or on what occasions they did not say; and if the other part of the condition is valid and may take effect alone, I think it is not established by the evidence.

Three witnesses swore they drank whiskey with Michael on meeting him casually on a few occasions during the four years after his father's death, before he removed to Seaforth; and one of them intimated that he met him there afterwards once, and that they had a drink, perhaps more than once; but they all spoke of it in a vague way, and could name no particular times or places, or whether the last occasion was one, two, or five years before Michael's death. On the other hand, it was proved that he had been for a long time before his death sick with consumption, of which he died, and that the physician who attended him prescribed the use of whiskey for his complaint, and that he took it only medicinally. His widow swore that he was not a drunkard; she had never seen him drunk or the worse of liquor, nor did she know him to take intoxicating liquors except under medical direction.

His mother died in 1881, so that the ten years of his probation had not expired when Michael died in June, 1886. He had still five years of his probation to run, and may be said to have been prevented by the act of God from fulfilling the condition even if it were valid. The condition is of a negative, not positive, character; not something to be done, but something to be refrained from, and by his death he did refrain, though not in the sense intended.

Upon the whole case, I think Michael took the fee simple, and died seised of it, and that he had a right to dispose of it by devise or otherwise. There are certain conditions precedent and subsequent which are frequently mentioned in the books, such as *Jarman* and *Theobald* on Wills, *Powell* on Devises, and *Fearne* on Contingent Remainders, and many cases in the reports deciding certain points with reference to them; but amongst English cases I have found only one reported in which the condition is similar to the condition in this case, and in that case it is a condition precedent expressed in clear unequivocal language, and in apt terms.

It is therefore not an authority in this case as regards its effect as a valid condition. I refer to *Tattersall v. Howell*, 2 Mer. 26. The cases in our own Courts nearest to this are, *Pew v. Lefferty*, 16 Grant, 408, and *Re Fox*, 8 O. R. 489. In the former the condition was precedent, and the executors were bound to see the condition was performed before they paid over the legacy; in the latter, though the condition was probably not precedent, it was made certain by constituting the executors judges of its performance or breach.

The natural difference between a condition precedent and a condition subsequent is, if the condition precedent is at the time of its creation void, or afterwards becomes so by the act of God, by the act of law, or by the act of the party who is to benefit by it, the estate which is dependent upon it is defeated: *Fearne* on Con. Rem. sec. 696, sub-sec. 6; but if the void condition is subsequent, as the estate to which it is annexed cannot be defeated by it, such estate is absolute in the first instance or becomes so afterwards: sec. 697, sub-sec. 11, *Blackstone's* Com. by Kerr, 133. In my opinion the plaintiffs, as executor and executrix of the last will and testament of Michael, are entitled to the lot of land in the pleadings mentioned, subject, however, to the trusts, conditions and directions of that (Michael's) will, and they are entitled to have the mortgage from the defendant, James Dunn, to the other

defendants, the loan company, declared null and void, and that the registry thereof be declared of no effect.

The plaintiffs are entitled to the costs of the action, and to any costs they may have incurred on the counter-claim of the defendants."

Notice of motion was given by the defendant James Dunn against this judgment.

February 14, 1887, *Lash*, Q. C., for the defendants, supported the motion. The question is, What is the interpretation of the will of James Dunn the elder? Are the conditions precedent or subsequent, or partly one and partly the other, and if subsequent are they valid? The devise to Michael, which is the one in question, is of the use of the land after the death of his mother. It does not give him the land, for in the same clause of the will it is afterwards said that if ten years after the death of his mother he should observe the conditions therein named then the lot is given to him, his heirs and assigns for ever: *Doe v. Egerton v. Brownlow*, 4 H. L. Cas. 31; *Clavering v. Ellison*, 7 H. L. Cas. 707; *Theobald on Wills*, 3rd ed., 419 to 438, 773-780; 2 *Jarman on Wills*, 5th Am. ed., 505. The Judge held the first condition void, which is, "that he" [Michael] "abstain totally from intoxicating liquors and card playing," because it was too vague and indefinite. In *Re Fox*, 8 O. R. 489, the devise was to the testator's son, "but he is to be known as a sober, steady, and industrious man. If at any time during the period of five years after my death it appears to my executors my son James does not remain sober I give them power to sell and dispose of the said property for such charitable purpose as to them should seem meet." Held, there was no such uncertainty in the condition "that the devisee is to remain sober for five years" as disables the executors or the judges from gauging its fulfilment. Bequest to a son, payable on his attaining twenty-one, provided he continued a steady boy, and remained in some respectable family until that

time, with a bequest over if he did not do so. Without any reason the legatee enlisted as a private in the Army of the United States, while hostilities were going on with the Confederates. Held, the condition was valid, and that the son by such conduct had not performed it: *Pew v. Lefferty* 16 Grant 408. He referred also to *Davis v McCaffrey*, 21 Grant 554; *Oliver v. Davidson*, 11 S. C. 166. "Give up low company," held a good condition: *Tattersall v. Howell*, 2 Merr. 26. He also cited *Marston v. Marston*, 47 Maine 495; *West v. Moore*, 37 Mississ. 114; *Pittingham v. Bromley*, T. & R. 530; *Evers v. Challis*, 7 H. L. C. 531. In *Re Babcock*, 9 Grant 427, it was decided that where the devise is made upon several conditions, one of which is void, the other, though good by itself, being coupled with the void one, will also be rejected; and that the first condition, embracing the use of intoxicating liquors and card playing, not being an objectionable act so long as it was not done in the way of gambling, the whole of that condition was void. It is contended that rule does not apply here. The learned Judge held also the second and third conditions to be void, which required Michael to be kind and obedient to his mother, and that he be known among his friends as an industrious man, as being too vague and indefinite.

R. Cassels, on the same side.

The Judge decided that Michael was not shewn to have had notice of the conditions of the will. Michael had notice of there being a will, and he should have informed himself what the terms of the will were, if he was entitled to notice: *Theobald* on Wills, 3rd ed., 419; *Murphy v. Broder*, Irish R. 9 C. L. 123; *Hawkes v. Baldwin*, 9 Sim. 355; *Cary v. Bertie*, 2 Vern. 333. As to contingent interests, R. S. O. ch. 105; In *Re Cresswell*, 24 Ch. D. 102.

Osler, Q. C., shewed causc.

The first condition affecting the devise to Michael is, that he "abstain totally from intoxicating liquors and card playing," and there can be no breach of that condition

unless the devisee fails to abstain *both* from intoxicating liquors and card playing. The violation of one of these acts would not be a breach of the condition. He referred to the cases on this point cited above.

This is a condition subsequent. The conditions are too vague and indefinite to be performed: *Maud v. Maud*, 27 Beav. 615, 29 L. J. Ch. 312; *Fillingham v. Bromley*, T. & R. 530; *Hamilton v. McKellar*, 26 Grant 110; *Clavering v. Ellison*, 7 H. L. Cas. 707, 29 L. J. Ch. 762; *Wynne v. Wynne*, 2 M. & G. 8; *Leech v. Leech*, 11 Grant 572; *Morrow v. Jenkins*, 6 O. R. 693; 1 *Jarman on Wills*, 4th ed., 797, 798, 827; 2 *Jarman* 7, 12, 13, 609. If the conditions were valid and a breach of them was committed by Michael, and no advantage was taken of such breach in his lifetime, advantage cannot be taken of the breach since his death; *Leech v. Leech*, 11 Grant. 572; *R. S. O.* ch. 102, sec. 2, subsec. 1; *Marriott v. Abell*, L. R. 7 Eq. 478; *Crozier v. Crozier*, L. R. 15 Eq. 282. The heir-at-law is entitled to a notice of the conditions of a will which defeat his estate as heir. Michael was such heir, and it was not shewn he had notice of the conditions which defeated his title as such heir: 2 *Jarman on Wills*, 4th ed., 13, 57; *Sutcliffe v. Richardson*, L. R. 13 Eq. 606; *Ferguson v. Ferguson*, 2 S. C. 498. As Michael did not live till the ten years from his mother's death had expired, and as he had these whole ten years within which to reform and observe the conditions, they are not binding upon him.

Lash, in reply:

The pleadings do not set up want of notice of the conditions to Michael.

See the case *In Re Moir*, 25 Ch. D. 605, as to a devise subject to residence on the property. *Fillingham v. Bromley*, *supra*, shews what will be a substantial compliance with a condition subsequent.

March 11, 1887. WILSON, C. J.—What is the reading of this clause in the will?

1. The plaintiffs say it is—

(a) That Michael was not subject to the conditions during his mother's life.

(b) That he took in fee upon her death.

(c) That he then became subject to the conditions.

(d) As a "consequence the conditions were conditions subsequent, operating for ten years after her death, in case he lived so long, but ending with his death if he died before the expiry of the ten years."

(e) That upon his death, about five years before the expiration of the ten years, the conditions were determined.

(f) That the real meaning of the will is, that no matter how he conducted himself during his mother's lifetime after the death of her husband—that is, no matter whether he observed the conditions or not for that period, or for any period up to the close of the ten years, there could be no forfeiture of his estate, because he had the whole ten years allowed to him after his mother's death within which to reform—that is, that the ten years were a period of probation, and if he reformed just before the end of that time, he was entitled to the property, absolutely freed from the conditions.

That construction gives no effect to the second condition, that Michael shall be kind and obedient to his mother, which of course means during her life.

It suffered Michael also to drink intoxicating liquor, to play cards as much as he pleased, and to refrain from being an industrious man, not only during his mother's life, but for the whole ten years after her death, if he lived so long. minus, it may be, one day, upon which last day, if he reformed and abandoned drinking and card playing, and was known among his neighbours for that one day as an industrious man, he would take the estate absolutely, because he had faithfully kept all the conditions; and as the ten years expired upon that last day, he was at liberty to drink and play cards and idle for all the rest of his life; so that

one day's conformity to the conditions was a faithful keeping of them, and gave him the property.

Upon such a construction it might be that Michael need not have kept the conditions even for a single day. He was not to keep them, it is said, in his mother's lifetime, nor during the ten years ensuing her death unless he lived for the full term of the ten years after it; and if he died before the ten years had expired, the property, nevertheless, would be his, because he had not had the full ten years probation within which to reform.

That construction, also, gives no effect to the declaration of the testator, that if Michael did not fill to the letter all these conditions he should have no right or title to the use of the land during or after his mother's lifetime, but the grandson should take it.

The word *during* is not so insensible as it has been argued to be, for the remainderman in general takes an estate *during* the term of the tenant for life, although it is sufficient if it vest the instant the particular estate is determined.

If the estate of Michael were not to vest during his mother's life, nor even at her death, nor until the end of the ten years after it, it would not vest at all as a remainder or contingent remainder, either of which must take effect at once upon the death of the tenant of the particular estate; for the particular estate, and the remainder constitute the one estate, and the devise to him and the grandson James would both be void.

It is for that reason the conditions must be construed to operate as subsequent conditions after the mother's death, to support the devise, and carry out the manifest intention of the testator.

The clause should not therefore be read as making the conditions precedent to Michael taking the estate after his mother's life.

The word *during*, as referable to the period during the mother's lifetime, should not in any case be rejected, for it

may be material to be considered as shewing that the interpretation to be put upon the whole clause is, that Michael is not to take any estate during his mother's life, nor even at *the time* of her death, unless he had up to that time observed the conditions ; that these words may be read as expressing the testator's meaning to be that the devise to Michael is to be construed as subject to the conditions as conditions precedent.

The argument, that the conditions did not apply at all during the mother's life, nor during the ten years after it, but that the latter period was a term of probation which failed altogether if he did not live for the full ten years after his mother's death, or if he reformed at any time within the ten years, upon the last day, for instance, is not maintainable in any view of the case.

The conditions in my opinion are, that they shall have operation during the mother's life and for ten years after it, and that the proper construction is that they are conditions precedent up to the time of her death, and conditions subsequent for the ten years after it ; and I see no reason why the clause may not be construed so that the conditions shall be precedent during the period of his mother's life, and such of them as continue beyond that time may be subsequent after her death. So far there is no difficulty in placing a reasonable and sensible construction upon that clause of the will. I do not read the will as giving to Michael the right or privilege of drinking intoxicating liquors in such quantities as he pleased, and to indulge himself in card playing as much and as often as he desired during his mother's life, leading, probably, as the testator thought, to waste of time and idleness, to bad habits and to drinking ; nor even to idle his time away, although he never drank or played cards, and to refuse to lead an industrious life during the lifetime of his mother, to whom he was required to be kind and obedient ; and yet take the land at the end of her life, which he might have made unhappy and miserable, merely because he reformed his conduct and habits for the ten years following her death.

It would be an unreasonable, perhaps an absurd, condition to make; and it is a highly unreasonable and improbable construction to put upon the will.

The lifetime of the mother was the period the testator would naturally desire his son to lead a reputable and industrious life, and not a riotous one, and not only to begin to lead a better one after her death. In no way of reading the will am I able to give it that meaning.

The questions then are, are these conditions valid in law? The first condition is, that Michael abstain *teetotally* from intoxicating liquors and card playing. The meaning of the condition is, that Michael shall abstain, just in the words of the will, from intoxicating liquors *and* from card playing; that is, from *both* of them, not only from one of them. The sense of the will and the intent of the testator require that interpretation.

If the disjunctive had been used instead; that is, if Michael were to abstain from intoxicating liquors *or* card playing, I should think the construction would have been the same, and that the word *or* would have been read as *and*. The injunction was directed against both acts. If there had been a prohibition against *thieving and* gambling, could it be argued that the devisee should take the estate if he continued *thieving* but did not gamble?

I could understand some argument being raised if the disjunctive had here been used, but I cannot understand how an argument can be had upon the condition worded as it is. *Abstain* has a negative meaning. Michael is not to use intoxicating liquors nor to practise card playing.

As to changing *and* into *or*, it has been usually done to favour the vesting of a legacy, and not to defeat a vested gift: *Malcolm v. Malcolm*, 7 H. L. 68; *Grey v. Pearson*, 6 H. L. 61, 3 Jur. N. S. 823.

In the last case [after the decisions given in 6 C. B. 819, 6 Ex. 47, and 3 DeG. & Sm. 316,] the Lord Chancellor (Cranworth) and Lord Wensleydale decided that on the devise of an equitable estate in tail to R. W., but in case he should die under the age of twenty-one *and* without

issue, then to A. W. and the heirs of her body, but in case she should die under the age of twenty-one *and* without issue, and subject thereto, the estate should be in trust for W. D., R. W. D. and E. D., in equal shares, as tenants in common. R. W. and A. W. both attained twenty-one, but died without issue. Held, R. W. took absolutely on attaining twenty-one, and that such a limitation over would not take effect unless the double contingency happened, that he died both under twenty-one *and* without issue; that to read it otherwise would be to reject the words "under age of twenty-one years" entirely, and thereby withhold the rational ordinary meaning from the testator's words.

Lord St. Leonards was dissentient. It is said by him it is clear that if a fee simple in place of an estate tail had been given, and the words had been, "that if R. W. die under twenty-one *and* without issue," that *and* could not be read *or*, but if the disjunctive had been used the conjunctive would have been used in its stead. There is a distinction where the first estate is in fee simple and when in fee tail. At page 99 he says: "Nobody is more disposed than I am to abide by clear words and to give them their rational and grammatical meaning; but I never did and I never can come to this conclusion, that the words of a will will not admit of modification according to the real intention of the testator, as you find it from other expressions, or from the whole context of the will. It is difficult to lay down any absolute rule upon the subject; but where I find the intention, and I find words pointing out the intention, and if I give to the words their simple meaning, according to grammar and according to their *primâ facie* import, I defeat the intention, I hold that I am bound by every rule of law and equity to see whether I cannot give to them by natural construction an import which will effectuate and not defeat the intention."

The following general rules are laid down :

If a devise be only on the performance of some particular duty or upon some particular event; that is, if it be a condition precedent, there is no gift unless the condition is

fulfilled; and it makes no difference that the event is impossible, impolitic, or illegal: *Egerton v. Earl of Brownlow*, 4 H. L. 1, 18 Jur. 71; *Sheppard's Touch*. 132, 133; 2 *Jarman on Wills*, 4th ed., 9; *Caldwell v. Cresswell*, L. R. 6 Ch. 278. But a bequest of personalty is not valid if the condition precedent is *contra bonos mores*: *Wren v. Bradley*, 2 DeG. & Sm. 49. A devise to take effect on a contingency will not *divest* an estate, unless all the events which are to precede the events of a substituted devise happen.

In *Harrison v. Foreman*, 5 Ves. 207, a fund was bequeathed to A for life, and after her decease to P. and S. in equal moieties, and in the case of the death of either of them in the lifetime of A., then the whole to the survivor living at her decease. Both P. and S. died in the lifetime of A., and it was held that after the death of A. the fund went to the representatives of P. and S.

Sturges v. Pearson, 4 Mad. 411; *Re Clarke's Trusts*, L. R. 9 Eq. 378, and other cases referred to in 1 *Jarman on Wills*, 4th ed., 827, shew the rule does not apply here in any way whatever.

A condition subsequent not performed owing to the ignorance of the legatee of its existence nevertheless worked a forfeiture where the property is given over, whether as to personalty or realty: *Hodge's Legacy*, L. R. 16 Eq. 92; *Astley v. Earl of Essex*, L. R. 18 Eq. 290. But that does not apply to the heir-at-law, who is devisee, for he has a title independent of the will: *Doe d. Kenrick v. Beauclerc*, 11 East 667; *Doe d. Taylor v. Crisp*, 8 A. & E. 779; *Murphy v. Lineham*, Ir. R. 9 C. L. 123. The condition when it involves anything in the nature of a consideration, is generally precedent, *Acherley v. Vernon*, Willes 153; *Theobald on Wills* 3rd ed. 374.

In *Acherley v. Vernon*, Willes, at p. 156, the Chief Justice said: "I know of no words in a will or deed which necessarily make a condition precedent or subsequent; that is determined according to the nature of the thing and the interest of the parties. See also *Hotham v. East India Company*, 1 T. R. 645; *Kingston v. Preston*, 1 Doug. 690.

I am of opinion the first condition of the will is rightly expressed to require the observance of both parts of it. Card playing is no doubt an innocent amusement if used at the proper time in moderation, and by way of rest when work is done. The use of intoxicating liquor is proper too when taken in necessity or medicinally. To make the prohibition against card playing apply against the terms of the will, only when it is applied to gambling, would justify cock fighting or horse racing if either of these pastimes had been expressed instead of card playing, when carried on without betting. The latter sports are certainly objectionable, though no gambling be carried on with them. They all lead to a kind of company not of an industrious nor usually of a respectable kind—to a waste of time; and they are all calculated to prevent the growth of and crush out all industrious habits.

The question then is, is the first condition valid in law, considered either as a condition precedent or subsequent? I refer to the following cases. In *Tattersall v. Howell*, 2 Merr. 26, the will, after stating that the plaintiff's conduct had been for some years very reprehensible in frequenting public houses and drinking to excess and keeping low company, proceeded, "If my said son will continue to go on in the way he has done against the advice of all his friends, I then allow him only £50 a year for his life, * * * and my residence to go as I shall hereafter direct, except a reserve I make of £5,500 should it please God to convince him of his error, and change his heart and conduct;" and in that event she directed the interest of the £5,500 to be paid to the plaintiff for his life; "that is to say, if my said son conform to my instructions, but not otherwise."

It was argued for the plaintiff the condition was too vague to be enforced by the Court; and it was also said for him that the uncertainty was that the plaintiff's conduct was said to be against the advice of his friends, to which his reformation was to be made conformable.

The Master of the Rolls, (Sir William Grant,) decided the condition was a valid condition and capable of being enforced; but as the facts were not sufficient the case was referred to take the evidence.

In *Wynne v. Wynne*, 2 M. & G. 8, the bequest of annuity or rent charge was to one of the defendants, Sarah Wynne, during her life, or as long as her conduct and behaviour should be *discreet* and meet with the approbation of the testator's wife, or which, in case of her death, should be approved of by the survivor or survivors of the trustees of the will. It was argued for the plaintiff that the condition was not too vague, and that the avowry which set out the condition should have averred the fact that the conduct of the wife had been discreet in fact; that is, should have averred performance of the condition, as it was contended the condition was a condition precedent; but the Court held it to be a condition subsequent, and so it was not incumbent on the avowry to aver performance, but for the plaintiff to plead non-performance.

In *Leech v. Leech*, 11 Grant 572, the condition of the devise to the wife was, "provided she does not marry or misbehave."

The widow married. Spragge, V. C., was of opinion, although the estate was determinable by the subsequent marriage, it nevertheless continued until some act to that end was taken by the one next entitled to the possession.

In *Pew v. Lefferty*, 16 Grant 408, the bequest was to the defendant by the will of her mother, payable on his attaining twenty-one, "provided he continue a steady boy, and remained in some respectable family until that time," with bequest over: Held, that the son by leaving the country when he was about 16 and taking service in the United States army during the late war, for a little more than four years, had not observed the condition and had forfeited the legacy, although it appeared the son had always been steady, and his conduct and character good, and he had been honourably discharged from the army.

Re Fox, 8 O. R. 489: "I devise to my son J. F., but he is to be known as a sober, steady, and industrious man. If at any time during the period of five years after my death it appears to my executors, hereafter named, that my said son does not remain sober, I give them power to sell, &c."

The Vice-Chancellor said, "There is no greater difficulty in determining what is a *sober man* than a *steady boy* and a *respectable family*." In the Divisional Court the Chancellor said, "There is no such uncertainty in the condition that the devisee is to *remain sober* for five years as disables the executors or the Judge from gauging its fulfilment."

Ferguson, J., was also of opinion that "the condition could not be considered void for uncertainty."

The cases of *Hamilton v. McKellar*, 26 Grant 110; *Wilkinson v. Wilkinson*, L. R. 12 Eq. 604; *Fillingham v. Bromley*, T. & R. 530; *Clavering v. Ellison*, 7 H. L. 707; *Marston v. Marston*, 47 Maine 495, refer to non-residence and have not much bearing on this case.

The following case is very applicable:

In *West v. Moore*, 37 Mississ, 114, the clause of the will was: "And as my son Peter seems to be of a dissipated, extravagant disposition, it is my will that my executors do not allow him to spend anything more than for necessary food, clothing, and doctor's bills, whilst under the age of twenty-one years; and furthermore, if my son Peter will go to some college and by application acquire a good practical education, and by good conduct and steady habits until the age of twenty-four, it is my will that my estate be equally divided between my children, both real and personal; but if my son Peter continues in his wild, extravagant, dissipated habits, my daughter Frances is to inherit all my estate, both real and personal, allowing to my son \$300 per annum."

Hardy, J., in delivering the judgment of the Court said: "The language employed in expressing the condition, if taken by itself, appears to be free from doubt or ambiguity. It manifests a clear intention that the vesting of the estate was to depend upon the performance of the acts or the observance of the course of conduct required. The lan-

guage is apt and proper to constitute a condition precedent. If he shall do so and so, the estate is to be equally divided between him and his sister, which shewed a clear intention that if he did not comply with the requisition the estate was not to be equally divided. But this is still more manifest from the negative form of expression, which immediately follows—'but if my son Peter continue in his wild, extravagant, dissipated habits, my daughter Frances is to inherit all my estate.'" It was argued that other parts of the will controlled this particular clause, but the Court held they did not; but whether they did or not would have no effect upon the question before us, which relates only to the construction of such a clause apart from the other parts of the will. At p. 135 the learned Judge discusses the validity of the condition :

"The next subject of enquiry is, whether the condition is void for uncertainty. The substance of it is, that the appellee should acquire a good practical education, discontinue his wild, extravagant and dissipated habits, and be of good conduct and steady habits until the age of twenty-four. It is objected it could never be ascertained to any reasonable certainty whether he had complied with these requisitions, as the question depends upon moral habits too vague and uncertain to be satisfactorily defined. This is true to a certain extent, and the objection would apply to the consideration of all questions depending upon moral qualities which are constantly presented for the action of Courts of Justice ; such as questions of good faith, of moral and intellectual capacity to do certain acts, of good or bad moral character, veracity, integrity, &c. The every day affairs of men are involved in such questions, and they must be determined by Courts when rights depend upon them. * * Ordinarily it would not be impracticable to determine whether he had so changed his habits, and acted with good conduct and steady habits for the period mentioned. The public judgment constantly determines such questions, and men competent to form opinion upon such matters judge of them and act upon such opinions ;

and the opinions of such persons in such cases form a proper basis of judicial action. * * So it would not have been difficult for judicious men to determine from his conduct whether he continued in his wild, extravagant, dissipated habits. * * There can be little doubt that discreet and intelligent men in the community will generally form a correct opinion as to whether a young man who has lived among them until the age of twenty four is of wild, extravagant, and dissipated habits or not;" and referring to *Tattersall v. Howell*, 2 Merr. 26, he held the condition was valid.

It does appear to me that the cases of *Re Fox*, 8 O. R. 489; *Pew v. Lafferty*, 16 Grant 408; *Tattersall v. Howell*, 2 Merr. 26; *Wynne v. Wynne*, 2 M. & G. 8, and *West v. Moore*, 37 Mississ. 114, shew expressly the first condition is not too vague and indefinite a matter for trial or for adjudication by the Court.

It is of no consequence to consider the second condition, that Michael shall be kind and obedient to his mother. It is more difficult to be determined. By that condition he was not required to live and take care of his mother, although that is likely what the testator intended or desired, and thought would be the case, as he was to have the land after her death; and, therefore, I cannot say that his leaving her four years after his father's death and moving to Seaforth was an act of unkindness or an act of disobedience; and there is no evidence that she ever forbade his moving away. But during the four years he did live with her, there is evidence of neglect to see that she had proper provision made for her, which from the relative position of the parties was unkindness on his part, although it could not have been said to be so on the part of a stranger—not at any rate to the same degree. I give no opinion upon that condition.

As to the third condition, "that Michael be known among his friends as an industrious man," which I read from the context of the will, "for the period of ten years after the death of his mother," but, taking it in its most

restricted sense, during the lifetime of his mother, I hold it to be in either case a valid condition, and to be a condition precedent for the period of her lifetime, but a condition subsequent for the ten years after her death.

What is there unreasonable or impossible in deciding upon the fact whether he was an industrious man or not? or who can better determine it than his friends?

It is said who are the friends referred to? I should say those who knew him, or even his neighbours, and had no ill feeling to him; or those, at any rate, who had a kindly or friendly feeling to him, although they did not personally know him, or those who might be called, if required, as witnesses to speak favorably of his character from personal knowledge, or to express the general repute of his neighbourhood. The *friends* referred to might be a term which was purposely used to insure a favourable body for him, his well wishers, and to exclude his enemies, or those who were not well disposed to him, or who would harshly judge him. The term does no more than describe those who would have been or would be called upon to try the matter if no mention of *friends* had been made. In that case the question would be determined by those who had the knowledge of the man and of his character in that respect. But these are the very persons who are to try the question now, with this advantage to the man, that those who are to speak of his being industrious are not only to be those who have no ill-feeling against him, but his friends; that is, those who have a kindly or friendly feeling towards him.

It was argued that no advantage of these conditions could be taken after Michael's death. I know of no such rule or law.

It was also said, as Michael was one of the heirs-at-law, he took an estate as such independently of the will, and it was not shewn he had notice of the will or of these conditions. That rule does not apply in this case, for he had possession of the land for about five years from his mother's death till his own, and that was not in the character of an

heir-at-law, but as a devisee ; and he had certainly knowledge of the will, and he has no claim to the land but as devisee under the will.

At the trial the only matter in question was, the validity of these conditions, and they are, in my opinion, valid. As respects their effect as conditions precedent, the title of the plaintiff has failed, because it was not disputed the conditions had not been observed ; and so far as they are conditions subsequent, the title of Michael has been forfeited.

There is, upon consideration, no object in granting a new trial, for it is quite obvious from the proceedings at the last trial the only question was as to the validity and meaning of the conditions ; and I am of opinion the motion must be absolute to set aside the judgment for the plaintiffs, and to enter it for the defendants, with costs.

ARMOUR, J., concurred.

O'CONNOR, J., adhered to the opinion already expressed by him.

*Motion absolute to enter judgment
for defendants, with costs.*

[CHANCERY DIVISION.]

RE MOOREHOUSE AND LEAK.

Mechanics' lien—R. S. O. ch. 120—Jurisdiction of Master in Chambers to annul registration of lien—Time of filing lien as between material-man and owner.

The Master in Chambers has jurisdiction to entertain a motion under R. S. O. ch. 120 sec. 23 to annul the registry of a mechanic's lien when the amount in question is over \$200. *Re Cornish*, 6 O. R. 259 followed. The question whether an issue as to a mechanic's lien should be summarily tried or not rests largely, if not entirely in the discretion of the judge.

When a contractor working for several owners has but a single contract for the supply of materials with the material-man, the time of filing a lien by the latter against an owner is not to be measured with reference to the duration of deliveries under the contract between the material-man and the contractor, but by the completion of the work by the contractor for the several owners.

THIS was an appeal from the judgment of Ferguson, J.

It appeared that one Robert Crabb was building eight houses for Dr. Moorehouse under two separate and distinct contracts, one of which related to six of the houses and the other to the remaining two houses. William Leak had a contract with Crabb for the supply of a lot of bricks, under which he had delivered bricks to Crabb's teamsters at the brick kiln, in such lots and at such times as Crabb chose to send for them, and sufficient bricks to complete the six houses were hauled to those houses on or before September 1st, 1886. Leak registered a lien for \$444 against these houses on October 5th 1886, against J. S. McMurray as owner, as he appeared as such in the Registry office.

A second lien was registered by Leak for \$786 against all the eight houses on October 14th, 1886.

Dr. Moorehouse, the owner, moved before the Master in Chambers for an order to vacate the first lien, on the ground that it was not filed within the thirty days allowed by the Mechanics' Lien Act, R. S. O. ch. 120, and that the owner was misdescribed; and to vacate the second lien as

to the six houses, and also as to the two houses except as to the sum of \$336, which he was willing to pay into Court as the amount claimed to be due, in order to get his property discharged from the lien, and the motion was argued on October 23rd, 1886.

F. E. Hodgins, for the lien-holder, objected to the Master's jurisdiction under the section 23 of the Mechanics' Lien Act, R. S. O. ch. 120, which reads :

" Upon application to the County Court, or the Judge thereof, in claims under two hundred dollars, and to the Court of Chancery in other cases, such Judge or Court may receive security or payment into Court in lieu of the amount of such claim, and may thereupon vacate the registry of such lien, or may annul the said registry upon any other ground."

J. B. Clarke, for the land-owner, contra.

The following cases were referred to : *Re Allen*, 31 U. C. R. 458, 494 ; *Smeeton v. Collier*, 1 Ex. 457 ; *Regina ex rel. Wilson v. Duncan*, 11 P. R. 379 ; *Morrison v. Taylor*, 46 U. C. R. 492 ; *Re Cornish*, 6 O. R. 259.

November 5, 1886 —THE MASTER IN CHAMBERS.—This alleged lien concerns eight houses on College street, divided into two groups, one (the westerly) containing six houses, the other being of two houses.

Mr. Leak who claims the lien, supplied bricks for the houses to the contractor Mr. Crabb, and it is for their price the lien is alleged. Dr. Moorehouse is the owner.

Two liens have been filed by the claimant, one on the westerly group of six houses, on the 5th October, 1886 : the other on all the eight houses filed on the 14th of October, 1886.

This motion is by Dr. Moorehouse, to discharge these liens, except as to \$336, which he desires to pay into Court—acknowledging the lien to that extent on the two easterly houses.

First, it is objected that I have no jurisdiction to hear this motion; that the County Court or the Judge thereof, or the Court of Chancery (according to the amount of the claim in question) are the jurisdictions referred to who can annul the registry, and not a Judge in Chambers—much less the Master in Chambers. It seems to me that the mention of the Court of Chancery in the Act is not meant to draw any distinction between the authority of the full Court and the authority of a Judge of that Court in Chambers. The intention of the statute was to refer such matters to the Court of Chancery as distinguished from the Superior Courts of Common Law.

The case of *Smeeton v. Collier* 1 Ex. 457, seems to be just like this. Power had been given by the Ejectment Act to the Common Law Courts to allow a mortgagor to apply to the Court to pay in the mortgage money in discharge of the mortgage, in an ejectment brought for non-payment of the mortgage; and though the words *Court* and *by rule of Court* are the words in the statute, it has never been doubted that a Judge in Chambers could exercise the powers under the statute, and in practice he always did. To that effect is the case in 1 Ex. 457.

The reference is here to the Court of Chancery, and that Court will no doubt conduct the particular business in hand by its own decree, the order of its Judges, or of its officers, according to the practice of the Court, and the particular proceeding in hand.

The order of a Judge is the act of the Court. It has been usual I know for a Judge to hear such motions as the present.

The bricks furnished by Mr. Leak were not furnished particularly for these jobs. He sold to Mr. Crabb the contractor 600,000 bricks, delivered at the kiln, for which he has received payments on account. There is a balance due. So that no particular brick of the 600,000 is entirely paid for. Mr. Crabb has been building with these bricks many other houses in the city besides these eight.

The work on these two jobs has been done under two contracts. The contract for the six westerly houses having been entered into on the 8th June last; and that for the two easterly houses having been entered into on the 22nd July last—after a very considerable progress had been made under the first contract—so that after the 22nd July both contracts were proceeding together.

One Pepper is shewn to be interested in the contract for the six houses; whether he is so interested as to the other two does not appear.

The contracts are between Mr. Leak and Dr. Moorehouse.

It is a matter in contest between the parties, but I think it is clear that all the bricks used in the first six houses were delivered on the ground on or before the 1st September, 1886, and the brickwork of those houses was completed on the 11th September, 1886.

The first registry of lien, which is on the six houses, was filed the 5th October, 1886.

It is peculiar in this—the claim treats J. S. McMurray as the owner, and is in respect of a claim of \$444, on account of bricks.

Mr. McMurray was not the owner, and had had no interest during any portion of the time, at, or since the making of either of these contracts. His name, I believe, appeared in the Registry Office as an owner; but in truth he had nothing to do with the land, and nothing to do with these contracts, and had no interest in the contracts.

The legal interest was at the time of the registry (5th October) in the London and Canadian Loan and Agency Company, but the equitable interest in Dr. Moorehouse. Since then Dr. Moorehouse has completed his title from the company, and he is now the legal owner. Neither Dr. Moorehouse nor the company are mentioned as having any interest, and as before stated Mr. McMurray is the only person charged as owner.

It is objected by Dr. Moorehouse's counsel that this registry does not bind his interest.

The 2nd claim of lien which is upon all the eight houses, was filed on the 14th October, 1886. It is against the above company, and Dr. Moorehouse, as owners, and claims \$786 for bricks furnished. As to this, Dr. Moorehouse is willing to pay into Court the sum of \$336, upon the two easterly houses; but seeks to vacate the registry as to the six westerly houses; and as to any claim upon the two easterly houses beyond the said \$336. He objects that the claim has been filed more than thirty days after the delivery of the bricks for the first six houses. He also takes the same objection to the first registry of the 5th October on the six houses.

I think that the groups of six houses and two houses, were built under contracts entirely distinct; and that the two transactions being naturally apart cannot be joined together, and made one of, because it may happen to suit somebody's interest to join them, and treat them as one whole transaction. The transactions are in truth separate, nor does it make any difference that in payment of cheques to Mr. Crabb the contractor, no distinction is made, and no particular cheque is placed to the one contract or the other. The existence of the two separate contracts did not call for any separation of the cheques. The amount paid would be the only thing that parties would naturally be solicitous about.

I think the first registry should be vacated, because it was registered more than thirty days after the delivery of the bricks for the six houses; and because it is against the wrong party that it makes the claim as stated above, and the second registry should also be vacated as to the six houses, as being registered beyond the thirty days.

It is true that Dr. Moorehouse is the owner of all the eight houses—(Mr. Pepper indeed has an interest in the six.)

But things change, and if I am to regard what is stated in argument, but does not appear in the affidavits, the six houses are now either sold, or in process of sale to different parties, and hence principally has arisen this trouble.

The lien-holder, appealed to a Judge in Chambers, again raising, among other points, the question of jurisdiction.

The appeal was argued by the same counsel.

November 8, 1886. FERGUSON, J.—It is not contended that the Master had not the jurisdiction, if a Judge of this Division sitting in Chambers would have jurisdiction. I am of opinion that a Judge in Chambers would have such jurisdiction: *Smeeton v. Collier, supra*, is, I think, in point, and *Re Cornish, supra*, is a precedent.

I am of opinion that the learned Master was not wrong in proceeding to hear and determine the matters before him.

Appeal dismissed with costs, upon this ground, and also upon the merits.

From this judgment the lien-holder appealed to the Divisional Court, and the appeal was argued on December 9th and 10th, 1886, before Boyd, C., and Proudfoot, J.

F. E. Hodgins, for the appeal. The Master in Chambers has no jurisdiction to make an order to vacate a lien. The expression "Court of Chancery," in secs. 23 and 24 of the Mechanics' Lien Act, R. S. O. ch. 120, is in contrast with other expressions, "County Court," or "a Judge thereof," so the Master in Chambers is precluded from acting: *Re Allen*, 31 U. C. R., per Wilson, J., at p. 494; *Morrison v. Taylor*, 46 U. C. R. 492; *Hilliard v. Arthur*, 10 P. R. 281; *Thurlow v. Beck*, 9 P. R. 268; *Bull v. The North British, &c., Co.*, 11 P. R. 83; *Reg ex rel. Wilson v. Duncan*, 11 P. R. 379. In *Re Cornish*, 6 O. R. 259, this objection was not raised. The affidavit evidence is all on one side, and an issue should be ordered when the workmen, &c., would be compelled to give evidence. There may have been two contracts between the owner and the contractor, but there was only one between the contractor and the lien-holder, and the time should count from the last delivery

on the latter contract. I refer to *Phillips on Mechanics' Liens*, 323; *Lindop v. Martin*, 3 C. L. T. 312; *Neill v. Carroll*, 28 Gr., per Blake, V. C., at p. 343; *O'Kisko Co. v. Matthews*, 3 Md. 168; *Moran v. Chase*, 52 N. Y. 346; *Hall v. Sheehan*, 69 N. Y., 618; *McCaulay v. Meldrum*, 1 Daly, N. Y., 396; *Sweet v. James*, 2 R. I., 270; *Paine v. Bonney*, 6 Abbot, (P. R.) 101, N. Y., *Pennock v. Hoover*, 5 Rawle, 291, 319, (Penn.); *Brabazon v. Allen*, 41 Conn. 361; *Bartlett v. Kingan*, 19 Penn. 341. In *Hudnit v. Roberts*, 10 Phil. 535, there was no entire contract between the contractor and the material-man, and in *Wilson v. Forder*, 30 Penn. 129, a purchaser for value intervened.

The owner's name is mere matter of description, and the registered owner sufficiently answers the statute; *Makins v. Robinson*, 6 O. R. 1.

J. B. Clarke, contra. The houses were built under two separate and distinct contracts, and each relates to the houses mentioned therein only. The owner has nothing to do with the contractor and the material-man's contract, so that it being all one, or otherwise, cannot affect him. The first lien was filed too late on the six houses, as the last bricks for those houses were delivered on or before September 1st, and the lien was not filed until October 5th, more than thirty days after. The second lien on the whole eight houses cannot be valid except to the extent of bricks used in the two houses, and my client was always willing to pay for them. The first lien does not charge the interest of Dr. Moorehouse, as an outsider is mentioned as owner. The owner must be named. See sec. 4 of the Act, sub-s. 2, (a). I refer to *Re Allen*, 31 U. C. R. 458; *Neill v. Carroll*, 28 Gr. 30.

January 8, 1887. BOYD, C.—The first objection as to jurisdiction of a Judge in Chambers is answered by the course of practice: *Re Cornish*, 6 O. R. 259, which is founded on authority. Jurisdiction is given by the Lien Act, ch. 120, R. S. O. sec. 23, to the Court of Chancery to annul the registry of a lien.

To this applies the language of Pollock, C. B., in *Smeston v. Collier*, 1 Ex. 462: "Where the Legislature simply gives a power to the Court, it is to be taken that the Court receives all the ordinary powers necessary for that purpose; and it is intended that the Judge should exercise those powers. No distinction exists between powers conferred by statute and those existing at common law, unless a distinction is to be gathered from the terms of the statute." In this particular instance the Judge in Chambers may exercise the delegated functions of the Court, and by reason of press of business the Master in Chambers may exercise the delegated jurisdiction of the Judge: *Kilkenny &c., R. W. Co. v. Fielden*, 6 Ex. 82, note (a), and Rule 420, O. J. A., Chy. G. O. 197, 210; *Rex v. Almon*, *Wilmott's Opinions*, 264; *Pesk v. Bucke*, 2 Ch. Ch. 294. See also sec. 13 of Lien Act.

It was secondly objected that this is not a case for summary relief, but one in which an issue should have been directed. That is a matter which rests very much, perhaps entirely, in the discretion of the Judge, and in the present case I do not see that any disadvantage accrues to the appellant from the mode of investigation pursued by affidavits and cross-examination thereon, which would not be equally adverse to him on the facts by the adoption of *viva voce* evidence.

The third, and that chiefly urged, depends upon the construction of the Lien Act, in view of the circumstances of this case. The appellant had an agreement for the delivering of bricks to the contractor, under which some bricks were delivered within thirty days before the filing of the last lien, (*i. e.*, on 14th October, 1886.) The respondent shews, however, that the houses in which the appellant's bricks were used were completed by the 10th September, and that the last bricks so used were delivered on the 1st September. The lien first filed on the 5th October, was therefore too late, unless the subsequent delivering of bricks under the contract with the builder, employed by him in

the erection of two other adjoining houses enures to extend the time.

It would be eminently unreasonable so to continue the period within which a lien may be filed. There was no contract for specific bricks for these particular houses, it was a general contract for so many bricks which were used here and elsewhere, as the contractor had occasion to distribute them. If the contractor is working for several owners, it cannot be that the time of filing a lien as to the owner whose building is first finished, must remain open till the completion of the last owner's house constructed out of the materials, (covered by the one contract between material-man and contractor). In other words, the time is measured not with reference to the duration of deliveries under the contract between material-man and contractor, but from the doing and completion of the work by the contractor for the several owners.

Sections 4, 20, and 21, are to be read together so as to ascertain the rights of material-men in this regard. In order to the due registration of such a lien, it must be within thirty days of the furnishing of the materials or the completion of the work—that is, of the particular work or building in which the materials are used. The owner is benefited to this extent by the supply of materials which go into his building, and to the extent he is benefited, the lien accrues if there has been the due registration thereof within the time limited.

The appeal fails and should be dismissed, with costs.

PROUDFOOT, J., concurred.

G. A. B.

[QUEEN'S BENCH DIVISION.]

MCMULLEN V. POLLEY.

Mortgagor and Mortgagee—Solicitor acting for both—Authority to receive mortgage money.

M. applied to McM., a solicitor, for a loan of \$6200 on his land. McM. got P. to advance the money. He then drew the mortgage, which was executed by M. and wife and left with him till P. came to pay the money. P. subsequently called on McM. and upon his registering and delivering over the mortgage paid him the money. McM. after this told M., on his calling on 6th March, that P. had not as yet been able to get the money, and on M. stating he required \$400 at once McM. gave him his own cheque for that amount. M. swore this was a loan and was subsequently repaid. On 2nd April McM. absconded without having accounted for the \$6000. After his departure two receipts were found among his papers, signed by M., and dated March 6, for \$400 and \$89.36, respectively, as money received from McM. on account of the P. mortgage, and a memo. from which it appeared that \$205.55 had been paid out of the mortgage money by McM. to discharge execution debts of M.'s which he had instructed McM. to settle:

Held, [in this affirming the judgment of Proudfoot, J.,] that it must be shewn that either express or implied authority had been given McM. by M. to receive the money to justify P.'s paying it to him: that his possession of the mortgage with an indorsed receipt did not give such authority, [but, in this reversing the judgment of Proudfoot, J.,] that there was evidence of authority to receive to his own use, out of the mortgage money when paid, the above three sums sufficient to entitle P. to hold the mortgage as a security to that extent.

THE plaintiff, by his statement, alleged that (2) prior to 4th March, 1886, he was the owner of certain lands on which there were three mortgages for about \$5,500, and being desirous of paying off the said mortgages and some debts due by him, he agreed with the defendant, through the intervention of the defendant's solicitor or agent, one John A. MacMahon, to borrow from defendant the sum of \$6,200 upon the security of the said lands. (3) Said MacMahon proposed a mortgage for the said sum, which was signed by the plaintiff and his wife on said 4th March, 1886, at the request of the said MacMahon, who was to retain the same undelivered until the transaction was ready to be completed by the payment of the money, which to the extent of the amount due upon the said mortgages then existing on the property was to be applied by defend-

ant in payment thereof. (4) At the time the said mortgage was signed no part of the mortgage money was paid or advanced, and said McMahon told plaintiff that he would advise him (plaintiff) when the money was ready to be paid over by defendant, when plaintiff expected to be present and to receive so much thereof as would be payable to him personally. (5) Plaintiff ascertained that on 5th March, 1886, defendant, instead of paying off said mortgages, which it was his duty and which he had agreed to do, paid into the hands of said McMahon said sum of \$6,200, and that thereupon said McMahon registered said mortgage and delivered the same to defendant. (6) Plaintiff never at any time authorized said McMahon to receive said money or any part thereof on his behalf. (7) On 6th March, 1886, plaintiff came to the city of Kingston and saw said McMahon, who told him that defendant had not yet advanced the mortgage money and would not do so for some time, and said McMahon then agreed to advance plaintiff some small sums for the payment of pressing claims, and he did then advance him the sum of \$400, which was to be repaid out of said loan, which money was all that was ever advanced to plaintiff in connection with said loan. (8) Said McMahon put off plaintiff from time to time with excuses to the effect that it was not convenient for defendant to advance said mortgage money, and he even required plaintiff to repay to him said advance of \$400, which plaintiff did, and at last he fixed the beginning of April, 1886, as the time at which defendant would complete said loan. Plaintiff, in the meantime, was entirely ignorant of the fact that defendant had placed the money in the hands of said McMahon. (9) On 28th March, 1886, said McMahon absconded from this Province, and since that time it had been discovered that he had committed many frauds, and he left no property behind him, and his present residence was unknown to his creditors. (10) Plaintiff, after the departure of said McMahon, ascertained for the first time that defendant had placed said moneys in his hands, and that the mortgage had

been registered without the prior mortgages having been released or paid off. (11) Plaintiff required the defendant to pay the said mortgage money as agreed upon or to release his mortgage on the said property, plaintiff being willing to pay what, if anything, was due by him in respect thereof, but defendant claimed to be entitled to hold said mortgage as a charge against plaintiff's property to the full amount of \$6,200.

Plaintiff claimed (1) payment of said sum by defendant; (2) or, in the alternative, a release of said mortgage or a reconveyance of said lands; (3) his costs of this action; (4) further and other relief.

Defendant by his statement of defence said (1), in answer to plaintiff's claim, that said John A. McMahon was the agent of plaintiff to receive the said sum of \$6,200, and that before the commencement of this suit he paid said sum to said McMahon in satisfaction and discharge of said claim; (2) that in the event of said payment to said McMahon not being held a good payment to plaintiff, there was no agreement in writing within the Statute of Frauds, and he set up said statute as a defence to so much of the relief as asked for the payment of the said sum.

Joinder of issue.

The cause was tried at the last Fall sittings of the Chancery Division at Kingston by Proudfoot, J.

It appeared that there were three mortgages upon plaintiff's lands to Walden, Hendricks, and Carruthers, respectively, and the first two mortgagees were taking proceedings to enforce their mortgages; the mortgage to the latter was to fall due on 23rd March, 1886.

In February, 1886, plaintiff applied to the latter for sufficient money to pay off the other mortgages, who refused, and the plaintiff then fell in with McMahon, whom he knew and who had formerly done business for him, who informed him that he had instructions to lend money for a gentleman in the country. Plaintiff informed McMahon that he wanted about \$6,000, and McMahon

wrote to defendant, who saw McMahan and agreed that if a friend who had spoken to him about a loan did not need it he would make the loan, and he agreed to see his friend on the subject and let McMahan know.

On 2nd of March, 1886, defendant wrote to McMahan as follows :

“STELLA, March 2, 1886.

“J. A. McMAHON, Barrister. Dear Sir,—I am prepared to take the mortgage you wrote me about, \$6,000, if you have not disposed of it. I want first mortgages; you are aware of that. Please let me know on receipt of this, and oblige Yours, THOS. POLLEY.”

On 4th March, 1886, plaintiff and his wife went to McMahan's office and executed a mortgage to defendant for \$6,200 on plaintiff's lands, payable at the expiration of five years, with interest yearly at six per cent., with the privilege to the mortgagor to pay off from \$100 to \$500 each year on account of principal. This mortgage contained in the body of it the usual acknowledgment of payment of the consideration money, and also a receipt endorsed for the amount of the same, which was signed by plaintiff; and on the 5th day of March, 1886, defendant came into McMahan's office with the money, and McMahan registered the mortgage and gave it to defendant. and defendant handed McMahan the money, \$6,200, and took his receipt for it. McMahan furnished defendant with a valuation of the property at the time made by one Beemer, who valued it at \$13,000, and some days afterwards McMahan forwarded to defendant the policies of insurance on the buildings on the property.

On the same 5th March, 1886, McMahan obtained from Messrs. Walkem & Walkem, solicitors for the mortgagees, who were taking proceedings, a statement shewing the amount due to them to be \$4,787.03.

On 6th March, 1886, plaintiff and his wife came to McMahan's office by appointment with him, expecting to meet defendant and have the matter closed; but, according to their account, McMahan told them that defendant

had not then got there, and being much in want of \$400, that McMahon went out to try and borrow it, and came back saying he could not get it, and then gave plaintiff a cheque, dated that day, for \$400 upon the Federal bank, which plaintiff, it being Saturday and after bank hours, got a third party to cash. This cheque was paid by the Federal Bank on the 8th of March. McMahon had also on that morning given a cheque on the Federal Bank, which was paid by the bank that day to the clerk of the Division Court for \$205.55, covering the amount of two judgments against plaintiff, one for the sum of \$121.70, at the suit of one Tierney, and the other for the sum of \$83.85, at the suit of one Robertson. Plaintiff went on that day to Carruthers and asked him for a statement of his claim up to March 23rd to give to McMahon, and the following was given to him, and he took it to McMahon that day :

	\$632
Principal	\$500
Interest	132
	632

The words "principal" and "interest" were added afterwards by McMahon. On the same day plaintiff executed an assignment, drawn by McMahon, of his policies of insurance to defendant. McMahon, on the same day, took from plaintiff the following receipt for the \$400 for which he had given him his cheque :

" Kingston, 6th March, 1886.

\$400. Received from John A. McMahon four hundred dollars (\$400), re Thomas Polley mortgage.

JOHN E. MCMULLEN."

McMahon also, on the same day, took from the plaintiff the following receipt.

" Kingston, 6th March, 1886.

\$89.36. Received from John A. McMahon eighty-nine dollars and thirty-six cents (\$89.36) on account of amount due me on account of the mortgage from me to Thomas Polley.

JOHN E. MCMULLEN."

Plaintiff, while admitting this letter to be his receipt, denied that he received the money, and any knowledge of what it was for. After 6th March, 1886, plaintiff, as he said, came in several times to see McMahon and get his business settled, but was always put off by McMahon on the ground that defendant had not yet been in with the money. On 16th March, 1886, it would appear that the plaintiff executed an assignment drawn by McMahon of a third policy of insurance to defendant.

On 20th March, 1886, according to plaintiff's account, McMahon, still telling him that defendant had not been in with the money, pressed him to return the \$400 which he had advanced him, and promised him to make a note in his favour for \$500, which McMahon endorsed, and they both went to the Federal Bank : that McMahon negotiated the discount of it, and that the proceeds were placed to McMahon's credit, and that McMahon gave a cheque to him for \$488, which he endorsed, and McMahon got the money. Plaintiff said that this note, so far as it exceeded \$400, was for McMahon's accommodation. McMahon's cheque on the Federal Bank in favour of plaintiff or order, dated 30th March, 1886, for \$488, with plaintiff's endorsement thereon, was produced, and it was proved that of the proceeds of the plaintiff's note for \$500, \$489.59 went to the credit of McMahon's account in the Federal Bank that day.

On 23rd or 24th March the plaintiff went to Carruthers and asked if his mortgage had been paid off, who told him no, and asked him to fix a date, so that he would not leave it open, and the date then was fixed for the 1st of April, that McMahon would pay it on the 1st of April.

Between the last mentioned date and the 2nd of April McMahon absconded.

In McMahon's safe was found the above mentioned letter of Polley, the statement given by Messrs. Walkem & Walkem, the statement given by Mr. Carruthers, the receipts for the money paid to the Division Court by McMahon for plaintiff, the receipts given by plaintiff to Mc-

Mahon for the respective sums of of \$400 and \$89.36, and this memo.:

McMullen

Paid D. Clark, &c.

Robertson	\$83 58
Tierney	121 70
McMullen note	34 00
" re Sleeman	37 06
Cash	11 00
Walkem	4787 03
Carruthers	632 00
Insurance, &c.....	4 00
Cash	489 36
	\$6200 00

Plaintiff said that he had never seen this memorandum, that he knew of: that he never had any settlement with McMahan: that the Sleeman note he had paid prior to this transaction: that the \$34 note was a note of his cousin, John P. McPherson, with which he had nothing to do, and that he had given McMahan the money to pay the judgments against him in the Division Court.

At the argument the notes mentioned in this memorandum were called for by the Court, and there was produced by the plaintiff a note, dated 10th Dec., 1885, made by John McMullen, said to be plaintiff's cousin, payable two months after date to John A. McMahan, or order, for \$32, which was protested, and on which the notarial fees were \$1.04, and which is said to have been found in McMahan's safe; also a note which was mutilated by having the body of it with the month and year and signature torn off, but which appeared to have been for \$37.56 at one month, payable at the Federal Bank, and to have been dated the 6th in favor of John A. McMahan; and the plaintiff also produced a bill of costs rendered to him by McMahan for \$37.06, for which, and for fifty cents loaned to him by McMahan, he said this note was given. This bill of costs was also mutilated by a part of the sheet of paper below McMahan's signature having been cut off.

Nothing may have been written on this part of the sheet ; but if the bill was dated it was probably dated on the part that was cut off. The date of the last item of the bill was October 23rd.

It was proved at the trial that the balance to the credit of McMahon in the Federal Bank, where he kept his account, at the close of the day on 28th February, 1886, was \$277.52 : that on 4th March, 1886, he deposited \$60, and a cheque was charged to him for \$154.64 : that his balance at the close of 4th March was \$182.88 : that on 5th March he deposited \$4000, and cheques were charged to him for \$148.18 and \$390 : that his balance at the close of that day was \$3644.70 : that on 6th March cheques were charged to him for \$250, \$20, and \$205.55 ; and that his balance at the close of that day was \$3169.15 : that on 8th March cheques were charged to him for \$75, \$400.32, \$400, and \$4.08 ; and that his balance at the close of that day was \$2249.75 : that the cheques charged on 6th and 8th March, respectively, of \$205.55 and \$400, were the cheques given by McMahon to the Division Court Clerk and to the plaintiff.

Plaintiff denied that he ever authorized McMahon to receive the money advanced by defendant upon the mortgage.

The learned Judge gave judgment for plaintiff. (See 12 O. R. 702.)

On 17th February, *Britton*, Q.C., moved to set aside the said judgment, and to enter judgment for the defendant ; or that the judgment should be that the defendant was entitled to hold his mortgage for the sum of four hundred dollars ; or for such other sum as to the Court should seem meet ; or why the judgment should not be so changed as to say to what the plaintiff was entitled, and to limit his relief to the having the mortgage discharged on such terms as to the Court might seem meet ; and for such order and such directions as to said Court might seem meet—on the grounds that one John A. McMahon, to whom defend-

ant paid the money herein, was the agent of plaintiff; and on the grounds that, as to the said sum of four hundred dollars and other sums, he actually paid the same to plaintiff, and for him; and on the other grounds taken in the statement of defence and at the trial of this action.

Walkem, Q.C., shewed cause.

March 11, 1887. ARMOUR, J.—It is well established by authority that the possession of the executed mortgage, with the signed receipt for the consideration money endorsed thereon, was not in itself an authority to McMahon to receive the mortgage money: *Viney v. Chaplin*, 2 DeG. & J. 468; *Ex parte Swinbanks*, 11 Ch. D., 525; *Gordon v. James*, 30 Ch. D. 249.

When, therefore, the defendant paid the money to McMahon without other authority, McMahon received it as agent of the defendant, and it became necessary for the defendant, in order to charge the plaintiff with the receipt of it, to shew that there was some alteration in the capacity in which McMahon held the money, or that the plaintiff had given McMahon authority, either express or implied, to receive the money for him.

The learned counsel for the defendant contended that such authority was shewn as to the sums of \$400 and \$89.36 by the form of the receipts given for them: that express authority was shewn for the payment of the sum of \$205.55 to the clerk of the Division Court; and that at all events the plaintiff should be charged with the receipt of the said sums of \$400 and of \$205.55, because, as he contended, it was clear that these last mentioned sums had been paid out of the money of the defendant, \$4,000 of which had been deposited in the bank by McMahon to his own credit and out of which he had paid these sums.

It may be fairly inferred from the evidence that these sums of \$400 and of \$205.55 were actually paid out of the defendant's money, but it does not appear to me that this fact alone, in the absence of any knowledge on the plaintiff's part that they were so paid, would entitle the defendant to charge the plaintiff with the receipt of them.

I am of opinion, however, that the receipts given by the plaintiff to McMahon for the sums of \$400 and of \$89.36, were an authority to McMahon to receive and take out of the mortgage money coming to the plaintiff so much thereof as they represented if it should come into his hands, and having come into his hands, being at the time they were given in his hands, an immediate appropriation of so much to the plaintiff was thereby effected and a consequent payment thereof by the defendant: *Barker v. Greenwood*, 2 Y. & C. 414. And I do not see that the subsequent giving of the note by the plaintiff to McMahon, as alleged, on the false representation alleged to have been made by McMahon to him, operated to do away with this effect of the transaction.

Adopting this view, I need say no more than that the plaintiff's story with respect to the giving of this note, the manner of its negotiation, and the way its proceeds were dealt with, is at least a singular one.

The plaintiff admitted that he had given express authority to McMahon to pay the \$205.55 to the clerk of the Division Court; but he alleged that he had previously left sufficient money with McMahon to make this payment, and that the authority he gave was to pay this amount out of the money so left with him, and not out of the mortgage money.

The time when this money was paid by McMahon, the fund out of which it came, and the circumstances under which it was paid, all point strongly to the conclusion that McMahon had the plaintiff's authority to pay this sum out of the mortgage money; and I do not think that the evidence of the plaintiff as to the amount of money he left with McMahon, as to the time when he left it, as to the sources from which he obtained it, and generally as to it, was of a sufficiently convincing character to counter-balance this conclusion.

The learned Judge thought the plaintiff was "an honest witness, and notwithstanding some discrepancies in his evidence, intended to tell the truth." It does not strike me on reading the evidence that this intention was real-

ized. There is a great deal in it tending to show that the whole truth was not told.

It would have been a very important factor in getting at the truth in this case if it could have been ascertained how the amount of \$89.36, mentioned in the receipt for that amount, was arrived at, and for what purpose the receipt was given. This the plaintiff ought to have known, and it is difficult to believe that he did not. It looks uncommonly like a balance that was arrived at between the plaintiff and McMahon on an adjustment of the amount that was coming to the plaintiff out of the mortgage money.

In my opinion it ought to be declared that the mortgage in question shall stand as a security to the defendant for the said sums of \$400, \$89.36 and \$205.55, with interest thereon from the 6th day of March, 1886, and that there shall be the usual decree for redemption, and in default for sale or foreclosure of the mortgaged lands, and that there shall be no costs to either party up to the present time.

WILSON, C. J., and O'CONNOR, J., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

McCLARY ET AL V. ELIZABETH JACKSON ET AL.

Lessor and lessee—Erection of buildings by lessee—Covenant by lessor to pay for not running with land—Land or devisees of lessor not liable for value of buildings.

Held, that a covenant by a lessor (not mentioning assigns) to pay for buildings to be erected on the lands demised did not run with the land, and that the lessee or his assigns had no claim as against the land or the devisees of the lessor in respect of the value of buildings so erected.

ACTION to recover the sum of \$662 on the following statements in the pleadings:

Alicia R. Lynch and her husband made a lease on the 1st of July, 1870, under the Act respecting short forms of leases, of a lot of land in the town of Stratford, for fifteen years, to John Parker. Parker erected a brick building on the land, and occupied it, soon afterwards becoming insolvent, and assigning under the Insolvent Acts to an official assignee, who, with the assent of the creditors, assigned to one Somerville, who assigned to the plaintiffs.

Alicia Lynch died in 1872, her husband having predeceased her and having by his will devised all his estate to her. She also left a will under the terms whereof and a partition subsequently made the defendants became entitled to the premises comprised in the said lease.

The lease contained a covenant as follows: "And the lessors covenant with the lessee that if the lessee shall erect a good and substantial brick or stone house on the land that the lessors will purchase the said building at a fair valuation, at the termination of the lease, such valuation to be ascertained by each party appointing one valuator, and in case of disagreement the two valutors shall have the power to appoint a third party, and the valuation of any two of the three shall be binding on the parties."

The plaintiffs said that the building erected by Parker was wholly unsuited for the proper use of the said lands, and the plaintiffs added thereto, so as to make the whole

a good and substantial brick house suitable to be used as a store : that the land was on the main street of the town and was suitable only to be used for store purposes : that the building erected by Parker was not of such a character as would have made it possible to pay the rent reserved by the lease, and the additions made by the plaintiffs were only such as were necessary to make it such a building as was intended by the lease to be erected, taking into consideration the character of the lot, the ground rent paid, and the other circumstances ; and the plaintiffs added to the building believing they were entitled to render the same by such an addition such as was contemplated when the lease was made.

The plaintiffs and defendants being unable to agree as to the amount at which the said building should be purchased according to the terms of said covenant, the value of the same was ascertained by reference to valuers as agreed, who settled the value of the said building at the sum of \$1748, valuing the original building at \$1086, and the subsequent addition at \$662.

The defendants since the commencement of the action paid the said sum of \$1086, but, denying that the reference covered the same, refused to pay the said sum of \$662, and denied their liability therefor.

The defendants by their statement of defence said the erections made by the plaintiffs were made in the year 1873, and were for their own convenience and were not made in pursuance of the terms of the lease. They also set up that the arbitrators appointed as aforesaid did not confine themselves to determining the fair value of the building erected by Parker, but assumed without authority and in excess of their powers to value the subsequent addition made by the plaintiffs after the transfer to them : that the covenant in question was made between the lessors and lessee only, and was a purely personal covenant, and did not run with the land ; and whether the plaintiffs were entitled to recover for the \$1,086 or not, in respect of the building put up by the lessee, the defendants

were always willing to pay it, and had since paid it to the plaintiffs; but as to the \$662 the defendants said the lessee, with whom only the lessors covenanted, did not put up the erection, in respect of which that sum was awarded, and they were not bound in any manner to pay it; but even if he had put it up it was under a covenant which passed no right claim or title to the plaintiffs to enable them to sue the defendants.

The action was tried before O'Connor, J., and a jury, who ruled, for the purpose of disposing of the case at the trial, for the plaintiffs, and the damages were assessed at \$704.50.

Nov. 19, 1886. *Moss*, Q. C., obtained an order *nisi* to enter judgment for the defendants. He also gave notice of motion, and on 7th February, 1887, supported the order *nisi* and notice of motion.

The plaintiffs cannot sustain the action, nor are the defendants liable in the action.

The arbitration is in excess of the powers of the arbitrators. The reference was only in respect of liability upon the covenant, and there was no liability upon it as against the defendants. The addition put to the building by the defendants is not within the covenant: *Spencer's Case* 1 Sm. L. C. 8th ed., 68; *Emmett v. Quinn*, 7 A.R. 306; Insolvency Act, 1869, sec. 10, 40, 48, 77; *In re Coleman*, 36 U.C.R. 569, 581; *Collver v. Shaw*, 19 Grant 599; *Dawson v. Fitzgerald*, 1 Ex. D. 257; *Elliott v. Royal Exchange Assurance Co.*, L. R. 2 Ex. 237.

Gibbons, contra.

The lessee intended, when he put up the part of the present building he erected, to put up the part which the plaintiffs afterwards erected: *Woodf. L. & T.*, 12th ed., 149; *Smith's L. & T.*, 3rd ed., 464; *Mansell v. Norton*, 22 Ch. D. 769.

The sum claimed has been awarded and should be paid: *Berrie v. Woods*, 12 O. R. 693.

[ARMOUR, J., referred to *Haywood v. The Brunswick Permanent Benefit Building Society*, 8 Q. B. D. 403; *Austerberry v. Corporation of Oldham*, 29 Ch. D. 750.]

Moss, in reply. In the case in 22 Ch. D. 769, the lease was drawn up binding the assigns, but it was not executed.

March 11, 1887. WILSON, C. J.—In the case last referred to the devisee for life under the will of the lessor entered as landlord and paid the out-going tenant for years, and brought an action against the executors of the devisor for the payment so made for the tenant's property on the farm on his leaving, which property the devisor and lessor had agreed with the tenant to pay by a lease which was drawn up but not executed; and in which lease the devisor and lessor had covenanted for himself, his heirs, executors, administrators and assigns to pay; and it was held that the landlord for the time being was the person liable to pay—that is, the plaintiff himself, and not the estate of the lessor.

The parties in that case agreed to treat as a matter of law the question of liability, and to consider the agreement as running with the land, as a special agreement between them, or treating the drawn lease not executed as actually executed, as I make out from the case, and by that lease the assigns were expressly named.

Here the parties have agreed to nothing outside of the covenant.

In *Spencer's Case* it is expressly stated that when the covenant concerns a thing which was not in *esse* at the time of the demise, but to be newly built after, it shall bind the covenantor, his executors or administrators, but not the assigns, for the law will not annex the covenant to a thing which hath no being unless the *assigns* be expressly named.

The decision on that part has been commented upon in *Minshull v. Oakes*, 2 H. & N. 793, but the law as reported by Lord Coke has not been altered, and that is precisely the case in question here.

Under that state of the law the defendants were not bound by the *covenant* to pay for the part of the building which the original lessee had erected, because the *assigns* of the lessor are not named: his executors only were liable; but the defendants became bound to pay for such part of the building put up by the lessor because they submitted to the arbitration to determine the question of the fair value of the said building, as the parties themselves could not agree upon it, which was in effect an admission voluntarily made by the defendants to pay the fair value, which the arbitrators put upon it. The two cases referred to by my brother Armour shew the plaintiff could have and has no remedy in equity in such a case as was at one time decided, but finally overruled.

The submission sets out the covenant which applies only to the building put up by the *lessee*. Then it recites that the *lessee* did build, and that the plaintiffs now standing in the lessee's place are entitled to the benefit of *the said covenant*, and that the respective parties have been unable to agree as to the fair value of *the said building* [which I read as confined to the building as mentioned in the submission, and as the further recital shews the arbitrators are to determine such value] *in pursuance of the terms of the said covenant*.

Then the operative part of the submission states that the parties have nominated the persons as arbitrators *to determine the matter in difference in pursuance of the said recited covenant in the lease*, which applies only to the building or portion of it erected by the lessee.

The value of the erection of the building put up by the lessee is the only matter covered by the covenant, and is the only matter referred. The valuation of the building, which was not put up by the lessee, was and is therefore an excess of power beyond the terms of the submission, which has been assumed and exercised by the arbitrators, and as such excess, which is now alone in question, for the other part of the building has been paid for

without question by the defendants, the part in excess must be declared to have been and to be absolutely void.

On the insolvency of Parker, the original lessee, his interest passed to his assignee in insolvency, and he could sell and assign that interest to any one ; but the remedy would in any case, in respect of the interest of the lessee, be enforceable against the executors and administrators of the lessors, and not against their assigns ; and the case of *Emmett v. Quinn*, 7 A. R. 306, decided that a covenant to build, not being one of the statutory covenants, must be read as made by the lessee alone, and not for his assigns, although the covenant was contained in a lease in pursuance of the Act respecting short forms of leases.

The notice of motion and order *nisi* will, therefore, be absolute, setting aside the finding and judgment for the defendants, which we do with the full costs of the action and of this motion, as the other part of the claim was paid before service of the writ and before the defendants had notice of its having been issued, and as the sum which has been paid is a sum which but for the submission the plaintiffs could not have recovered.

ARMOUR, J., concurred.

O'CONNOR, J., adhered to his ruling at the trial.

Judgment for defendants, with full costs.

[CHANCERY DIVISION.]

ARCHER ET AL V. SEVERN ET AL.

*Executors—Misappropriation—Liability of co-executor—Compensation—
Direction in will to erect suitable monument.*

When one of two executors who was entitled under the will of his testator to a large sum charged on the real estate, but which could not be considered a legacy or a debt in such a sense that the personal property was the primary fund for the payment of it, had applied in his own business a portion of the personal estate, which was by the will directed to be invested, and which, although large, was not equal in amount to the charge in his favour on the realty, and his co-executor, though aware of such application, had not taken any steps to prevent the same.

Held, that they were both equally liable to account for the whole of the said principal sum and interest with rests.

Re Crowter, Crowter v. Hinman, 10 O. R. 159, distinguished.

Where the personal estate not specifically bequeathed came to the hands of certain executors and trustees, was \$41,818.99, of which they expended \$25,100.93, and the rents and profits of real estate that came to their hands were \$4,051.90 of which they expended \$3,816.91, and there appeared a large number of items on each side of the account, over 300 on one side, and over 400 on the other, and it appeared that there had been a good deal of labor, care and trouble in the management of the estate.

Held, that five per cent on the total sum thus come to their hands, was not excessive to be allowed as compensation, although \$16,953.05 of the estate moneys remained in their hands with which they were chargeable.

Where a testator provided for the erection "of a suitable tablet" over his grave, "not to exceed \$1,500," and also of monumental tablets or stones, &c., and the erection thereof over the graves of his deceased wives, and died worth \$200,000, and the executors spent \$3,000 on a monument to him and his wives, removing the remains of the deceased wives to the same burial place as the testator,

Held, that they might properly be allowed the said sum of \$3,000 in their accounts.

THIS was a suit brought by William Henry Archer and William Booth, who with the defendant George Severn were the executors and trustees under the will of John Severn, deceased, for the purpose of having the said will construed, and the rights of all parties determined in respect to certain matters in the bill of complaint mentioned, and for further relief. The other defendants were devisees under the will.

The case will be found reported 8 A. R. 725, S. C. Dig. 535, the judgment of the Supreme Court, dated February 16th, 1885, finding George Severn entitled to a charge on

the whole of the testator's real estate for the sum of \$27,000, being the purchase money of certain of the testator's lands with interest.

By the judgment of Ferguson, J., made on February 13th, 1882, besides the adjudication in respect to the charge of George Severn on the real estate, administration of the estate was ordered, and it was referred to the Master in Ordinary to take an account of the testator's real and personal estate, come to the hands of the plaintiffs and the defendant, George Severn, or of any or either of them, and to inquire and state who were the persons entitled to share in the same, and in what proportions.

In paragraph K. 4 of his will the testator directed his executors to hold: "All the rest and residue of my personal estate, after payment thereof of my just debts, funeral and testamentary expenses, and the expenses incident to the execution of the trusts herein, and to the purchase of and erection of a suitable tablet over or nigh to the vault or grave wherein I may be interred, such grave, vault or tablet not to exceed \$1,500, and also of monumental tablets or stones, and to the erection thereof at, over or near to the graves of my deceased wives, in trust for &c."

In paragraphs H and K of his said will he provided: "(H) I devise all other the real estate, and bequeath all other the personal estate," (*i. e.*, except certain specific devises and bequests) "which shall belong to me at my decease, to my said trustees, herein named, upon trust to sell and convert into money my said other real and personal estate, when and as the trustees or trustee for the time being of my will shall in their or his discretion deem most advantageous so to do * * And I direct my trustees or trustee for the time being to invest the moneys to arise as aforesaid in the names or name of the said trustees or trustee in or upon any public stocks, funds or securities of the Province of Ontario or Dominion of Canada, or on mortgage of freehold or leasehold estates in said Province or Dominion * * (K) And as to the money to arise as aforesaid, and the

stocks, funds, and securities, wherein the same shall be invested (hereinafter designated my trust funds) my said trustees or trustee shall stand possessed thereof in trust *

*" And in paragraphs L and M of his will he provided as follows: "(L) And it is my will and desire that if at any time between the day of the date of this my will and the time of my decease, any sale or other disposition of any of the said lands and premises herein specifically devised by me, shall be made by me, the consideration money received therefor in money or otherwise, to the amount thereof, or the value thereof, shall be a charge upon the whole of my real estate, shall become due and payable to the devisee to whom the said land is herein specifically devised or to his or her heirs, executors, administrators or assigns within five years after my decease, with interest after the first year of my decease, the securities (if any) received in part or whole payment of such consideration, if in being at the time of my decease, to be transferred, conveyed and assigned to the said devisee, his or her executors, administrators or assigns, and to be by him or her or them received as to the amount owing thereon in part or in whole payment of the said consideration money as the case shall be.

(M) And it is my will and desire that my said executors shall, notwithstanding anything herein contained to the contrary thereof, pay the said several legacies herein bequeathed sooner than herein specified if the assets of my estate will permit, without making any great sacrifice thereof, and they shall be at liberty to pay within such period sums on account of the said bequests when and as often as it shall seem to them expedient."

By his report, dated June 30th, 1886, the plaintiff Archer having previously died, the Master stated in the ninth paragraph that he had allowed the said executors as compensation for their pains and trouble in the management of the said estate the sum of \$2,293.55; and having in the first paragraph of his report found that there was a balance of \$16,718.06 of personal estate in the hands of George Severn, having been received by him with the assent of the

plaintiff Booth, and with which they were both chargeable, and in paragraph seven that there was a balance of \$234.99, in their hands in respect of rents and profits of the real estate the said two sums amounting together to \$16,953.05, in paragraph twelve he specially reported that the defendant George Severn, had used in his business the said sum of \$16,953.05, and that the said defendant claimed before him the right to appropriate and apply the said moneys in part payment of his claim for \$27,000, allowed to him by the judgment herein as a charge on the whole real estate of the testator, and that the plaintiff William Booth as co-executor with the said defendant was aware of such appropriation, but made no effort to secure for the estate the said moneys in the hands of the said defendant, but that he (the Master) had not charged the said executors with annual rests on the same; and he also specially reported that "prior to the erection of the monuments of the said testator and his wives as provided in the said will it was agreed between the plaintiffs Archer and Booth and the defendant George Severn, that the cost of the said monument to the said testator should be \$1,500, and that if the legatees would not consent to a larger expenditure the said defendant George Severn would pay for such larger expenditure; that thereupon the said George Severn erected a monument costing about \$3,000 for the said testator and for three of the wives of the said testator; that upon the said agreement and representation of George Severn, the said Booth agreed to the erection of the more extended monument: that the said expenditure had been disputed by the other legatees; but since the evidence in respect of the said monument was taken the plaintiff Booth (the said Archer having previously died on the 2nd day of April, 1886) by his solicitor asked that the said expenditure of the said sum of \$3,000 for the said monument be allowed to the said executors, and he (the Master) had allowed that sum in the said accounts."

In respect to the erection of the monument, the evidence shewed that at the time of his death the testator owned

two small lots in the Necropolis, Toronto, in one of which were buried three wives who had pre-deceased him. Many years before his death he had erected on this lot an expensive monument to one of these wives. The executors, one of whom was one of the four residuary beneficiaries, purchased an expensive lot in Mount Pleasant Cemetery, Toronto, and in it the testator was buried, and to it were removed the remains of the three wives; and one monument was there erected to the memory of the testator and the three wives, costing in all about \$3,000. At his death the testator was worth nearly \$200,000.

The defendants other than George Severn, Henry Severn, and William Severn, now appealed from this report on grounds which, with the other facts of the case, sufficiently appear from the judgment.

The appeal came on for argument before Ferguson, J., on October 9th, 1886, when it was in part argued, the argument being continued and concluded on October 22nd, 1886.

Moss, Q.C., for the defendant Elizabeth Pannell. As to the compensation to the executor, we would especially refer to the recent cases of *Re Fleming*, 11 P.R. 272, 426; *Re Honsberger*, 10 O. R. 521. Here the executors collected certain moneys through their solicitor, and *Thompson v. Fairbairn*, 11 P. R. 333, shews that under these circumstances they should not get the same compensation as if they had collected it themselves. The rule seems now to be that if a sum, say \$10,000 is received by an executor, say on a mortgage, 1 per cent. is enough.

[FERGUSON, J.—The first time I ever knew so small an amount allowed as 1 per cent. was by the Master in *Re Fleming*, 11 P.R. 272.] The compensation allowed to the executors here is excessive under *Thompson v. Fairbairn*, *supra*.

As to the second ground of appeal; it is clear on the evidence that the Master should not have allowed more than \$1,500 for the monument. On this point see *Lund*

v. *Lund*, 41 N. H. 355 ; *re Lunkey*, 4 Realf. (N. Y. Surr. C.) 95 ; *Smith v. Rose*, 24 Gr. 438 ; *Menzies v. Ridley*, 2 Gr. 544.

As to the third ground of appeal ; the cases all seem to shew that where the executor has used the money in his own business this is always punished by rests, or if he prefers it the *cestui que trust* can follow the profits : *Inglis v. Beaty*, 2 A. R. 453 ; *Re Honsberger*, 10 O. R. 521. For similar cases see *Walker v. Woodward*, Russ. 107 ; *Docker v. Somes*, 2 My. & K. 655 ; *Jones v. Foxall*, 15 Bea. 388 ; *Williams v. Powell*, *ib.* 461 ; *Saltmarsh v. Barrett*, 31 Bea. 349 ; *Small v. Eccles*, 12 Gr. 37. The excuse made here that the money was employed in part payment of George Severn's claim against the real estate of \$27,000, is no valid one. He was not entitled to this for five years. Moreover, he had only a charge on the real estate, whereas this was personal estate.

Snelling, for the defendant, Mary Davison. Though the Master was asked to give his reasons for not charging rests, he would not do so. The rule seems to be that rests are directed by the Court when there has been a wrongdoing with the money : *Westover v. Chapman*, 1 Coll. 177 ; *Palmer v. Mitchell*, 2 My. & K. 672 ; *Heathcote v. Hulme*, 1 J. & W. 122 ; *Attorney-General v. Solly*, 2 Sim. 518 ; *Boys' Home of the City of Hamilton v. Lewis*, 4 O. R. 18.

J. H. Macdonald, Q. C., for the defendants, Ann Hudson, Jane Hudson, and Sophia Atkinson. The fact that George Severn had a charge on certain lands of the estate for a claim has no bearing on the question. We only ask to have George Severn made liable for such sums as the legatees would have had if he had followed the terms of the will. As to executors' commission, *McLennan v. Heward*, 9 Gr. 279, may be referred to : (a)

(a) At the close of the argument in support of the second ground of appeal, the learned Judge, without calling upon the plaintiffs, gave judgment as follows :

The testator directed the erection of a tablet or monument to himself, not to exceed in cost, \$1,500. He also directed monuments or tablets in memory of each of his three deceased wives, not placing any limit as to

S. H. Blake, Q. C., Lash, Q. C., and H. Cassels, for the plaintiff. It is very easy to belittle what is done by another, but how can it be said that taking all that has been done \$2,200 representing remuneration for five years is too much. *Thomson v. Fairbairn*, 11 P. R. 333, was a very different case. The Master's report should not be interfered with on this point. The third ground of appeal is most senseless. George Severn is entitled to this money with interest at six per cent. The moment he took it, interest stopped running, and there was enough estate left to pay every specific legacy, and leave a surplus. The appeal divides itself into two divisions: (1) What is the position of the co-executor William Booth. George Severn alone got this money, and alone used it, and it is only by reason of the harsh rule obtaining against a co-executor that Booth is liable, viz., because there is knowledge proved or imputed against him that he knew his co-executor was receiving it. If ever there was a case when the Court would stretch its rules to prevent what might almost be called a wrong done to Booth it is the present. Against Booth at all events interest should not be charged. It is clear nothing was made out of this money, that Wm. Booth made nothing out of it; and the only reason that he is charged with the principal was that he knew his co-executor was receiving

the costs of these. Only one monument was erected in respect of the whole four. This is satisfactory as a monument for its purposes. The removal of the remains of the wives is not objected to, and all is satisfactory except that this monument cost \$3,000, and this has been allowed by the Master. It is in evidence, out of the mouth of one of the executors, not being George Severn, that this is a suitable and, in his opinion, not an extravagant memorial. Opinions may well differ on such a subject. I can only offer my own, which is, that the appeal is not sustained on this ground, and as to this ground should be, as it is, dismissed with costs.

The briefs of counsel for plaintiffs shewed that they were prepared to refer to the following cases, on the point of the sum proper to be allowed for the monument: *Will*, on Exec., 8th ed., p. 972; *Smith v. Rose*, 24 Gr. 438; *Menzies v. Ridley*, 2 Gr. 544; *Schouler* on Exec., s. 422; *Bell v. Briggs*, 5 Eastern R. 745; *Burnett v. Noble*, 5 Redf. (N. Y. Sur.) 69; *Valentine v. Valentine*, 4 ib. 265; *Re Luckey*, ib. 95; *Porter's Estate*, 77 Pa. 43.

some money : *Tebbs v. Carpenter*, 1 Mad. 290 ; *Vanstone v. Thomson*, 10 Gr. 542. Where there has been money which has not been got in, but the trustee is only charged with inactivity, there is no case where he has been charged with interest. This seems good law. If a co-executor merely knows his co-executor has been receiving money but has received nothing, he will only be charged with the principal, not with interest. *Vanstone v. Thomson*, 10 Gr. 54, shews this. The Court charges trustees with money which they might have received, but did not receive, with interest : *Re Crowter, Crowter v. Hinman* 10 O. R. 159, follows the same rule. [FERGUSON, J.—In that case I was somewhat troubled by authorities as to the rule where one executor has enabled another person wrongfully to get money.] But your Lordship assented to the rule laid down in *Tebbs v. Carpenter*, 1 Mad. 290. Now, secondly, as to the position of George Severn, on two points there can be no doubt (a) instead of the personal estate being simply auxiliary, it was the primary fund out of which George Severn's claim should be paid ; (b) at any time George Severn could have deducted that from any money which he had in his hands, and the only thing to interfere with that would be an insufficiency of money to pay creditors, which does not arise in this case. In what George Severn was doing in taking the money he was really making the best possible investment for the money, for he was stopping the interest running on his claim. A proper interpretation of the various clauses of the will shews this : *Saltmarsh v. Barrett*, 31 Beav. 349. This is a strong authority for the proposition that Booth should not be charged with interest. The Master was therefore right in not charging interest.

Moss, in reply. The duty of the executors was to pay the legatees out of the money in question the \$16,000 of pure personalty, which was the only fund out of which they could be paid, and which was the only fund the testator had provided for the payment. The legatees could, therefore say, " We don't care how you executors and resi-

duary devisees transact your business. We want you to follow the will and pay us in the way the testator indicated his wish that we should be paid." They departed from the provisions of the will. As to W. Booth, this is not a case in which you can separate him from George Severn. By his knowledge and acquiescence, since he knew the money was in George Severn's hands, he made himself equally liable to pay interest. *McCarter v. McCarter*, 7 O. R. 243, shews this rule. *Vanstone v. Thomson*, 10 Gr. 542, proceeded on this that administrators were charged with rents and profits, which but for wilful neglect they might have received, and the Court says as a general rule interest will not be charged when the money has not come to the hands of either. Here one of the executors had received it. *Sovereign v. Sovereign*, 15 Gr. 559, shews the distinction between the cases. The judgment was by the same Judge as *Vanston v. Thomson*. W. Booth, though complaining, did nothing. They let George deal with the money. One executor, therefore, is just in the same position as the other.

No one appeared for the defendants William Severn or Henry Severn.

October 25th, 1886. FERGUSON, J.—An appeal from the report of the Master in Ordinary, dated June 30th, 1886.

The first ground of appeal is:

That the amount \$2,293.55 allowed by the Master to the executors as compensation for their pains and trouble in the management of the estate is excessive and beyond what should have been allowed.

The amount of personal estate not specifically bequeathed that came into the hands of the executors, as shewn by the report, was \$41,818.99, of which they expended the sum of \$25,100.93, as shewn by the same report, leaving in their hands the sum of \$16,718.06.

The rents and profits of real estate that came into their hands were \$4,051.90, of which they expended and were

allowed \$3,816.91, leaving a balance in their hands of \$234.99.

The total amount of personal estate not specifically bequeathed and of rents and profits of real estate that came into their hands was as above \$45,970.89, and the amount allowed as compensation is about five per centum upon this sum.

There is a large number of items on each side of the account, as was said on the argument, over three hundred on one side and over four hundred on the other side. Some of these items were considerable sums, and many of them small sums, some, a considerable number, being small sums of rent collected. It is, I think, readily perceived that there was a good deal of labor, care and trouble in the management of the estate.

The sum remaining in the hands of the executors was, of course, only collected, or got in, and not expended by them, and as to this sum, according to some of the authorities, they would not be entitled to a full commission, but only one-half thereof, and it was contended that as to the large items of the account the commission or compensation allowed was clearly too much. It is said in more than one of the cases on the subject of compensation to Executors or Trustees that sometimes five per centum is too large a compensation, and that in some cases it would be an inadequate one. In this instance the learned Master may well have had in his mind the idea or opinion that in respect to a large part of the estate the five per centum would be an inadequate allowance, though perhaps too much to allow in respect of other parts of the estate. This is the view that would, I think, have occurred to me had I been acting in his place, and although there is the sum mentioned yet in the hands of the executors, and with which, as is said in the report, they are chargeable, and although there are many considerable items in the account shewn, I do not see my way to saying that the conclusion of the Master is erroneous. I cannot say that it appears to me that he is wrong, or, at all events, so clearly wrong that I should

upon this appeal reverse or disturb what he has done, and I am of the opinion that as to this ground of appeal the appeal should be, as it is, dismissed, with costs.

The second ground of appeal is :

That upon the proper construction of the will, and upon the facts otherwise disclosed in the report, and the evidence taken upon the reference, the Master should not have allowed more than the sum of \$1,500, for the erection of the monuments referred to in the will, and that the Master was not warranted in allowing the sum that was allowed by him.

The appeal as to this ground was on the argument thereof dismissed, with costs.

The third ground of appeal is :

That upon the facts disclosed and the evidence, the learned Master should have charged the executors with interest or with annual rests, the executor, George Severn, having used in his business and appropriated, as stated in the report, the sum of \$16,953.05, being the balance in the hands of the executors as stated in the report.

This sum appears to be money that should have been invested and held in trust according to provisions contained in paragraphs H. and K. respectively of the will. There was by the will a direction to invest this money. That it was not invested according to the direction, and that it was used by one of the executors and trustees in his business, to the knowledge of the other surviving executor, from about the month of February, 1882, are facts that seem to be beyond dispute. It is also a fact that this other surviving executor took no measures upon his acquiring this knowledge to prevent such use being made of the money or in respect of this alleged breach of trust. This sum is yet in the business of the executor who so used it, or at all events it has not been taken out of the business and invested or paid over.

In the simple case of an executor or trustee so appropriating and using money directed to be invested, he is undoubtedly chargeable with interest thereon with rests.

In this case it was contended on behalf of the executor, George Severn,^f who had so used this money, that by the provisions contained in paragraph L. of the will, and the fact that had taken place—namely, the sale by the testator of the real estate specifically devised to him (this executor) he was entitled, as a legacy or debt to him, to the amount of the charge in his favor upon the whole of the real estate, which charge has, as I understand, been determined to be \$27,000 or thereabouts; and that as the personal estate was not discharged from the payment of this sum, he had a charge upon that also for the amount, and that for this reason he was justified in doing as he did with the money. In aid of this contention the provisions of paragraph M. of the will were also invoked. It was also contended that his so taking the money stopped *pro tanto* the running of the interest upon the charge in his favor, and that the matter of interest, the subject of this ground of appeal, was a mere matter of book-keeping, as it were, between this executor and the others entitled to shares or portions of the estate. There were other arguments in favour of this executor, but the ones briefly outlined above, appeared to me to be the main ones.

The provisions of the will in respect to this charge upon the real estate, are peculiar and to me present some difficulty. I am, however, of the opinion that the amount of this charge on the real estate, is not and cannot be considered a legacy or a debt in such a sense that the personal property was the primary fund for the payment of it, or that its being charged upon the real estate made it also a charge upon the personal estate unless the personal estate were in words or otherwise discharged from payment of it, and I think one of these contentions is so answered. As to the other contention, (that it is, so to speak, a mere matter of bookkeeping between this executor and the others entitled) I think it is sufficiently answered by the fact that the persons entitled to the real estate (on which the charge in favor of this executor is) and the persons entitled to share

in the fund in question are not throughout identical. It does not appear to me, that this executor was justified in so using these moneys, and I am of the opinion that he was not, and I perceive no sufficient reason why he should not if he were a sole executor and trustee be charged with interest with rests, according to what I think may be called the common rule in such cases. All the contentions in favor of this executor were of course employed in favor of the other surviving executor, with the additional arguments that as he had not received any of the moneys no interest could be charged against him, and then that this being so the conclusion should be that no interest should be charged against either executors, because this ground of appeal was against both jointly. In *Re Crowter*, 10 O. R. 159, I was of the opinion that the executrix sought to be charged was not liable for either principal or interest, and that even if she had been liable for the principal she would not have been liable for interest, but she was not shewn to have had any knowledge of the misapplication of the fund, or that a fund existed after payment by the acting executor of certain debts and incumbrances of the estate which should have been paid with or out of the price of the land sold or with this and other moneys.

In *Sovereign v. Sovereign*, 15 Gr. at 560, the Chancellor, after referring to *Tebbs v. Carpenter*, 1 Madd. 290, says: "But in this case it seems to me that there was something more than mere negligence on the part of Cook; that his inaction amounted in effect to acquiescence in the spoliation of the estate which was going on, of which he was aware and against which, though complaining, he did nothing." The estate of Cook was charged with interest. The judgment was affirmed on rehearing.

It can scarcely be said that there was spoliation of the estate in the present case. There is, however, evidence of troubles in the business in which the money was used by the executor George Severn.

In his judgment in *Sovereign v. Sovereign*, Mowat, V. C., said, at p. 563: "But there are cases of the highest author-

ity in which interest has been charged though the principal sums never reached the hands of the trustees or executors, who were charged with the loss," the learned Judge referring to a number of cases on the subject.

As early as about February, 1882, the executor Booth was aware that this large sum of money which he knew had been directed to be invested in the manner specified in the will was in the hands of his co-executor, and contrary to the direction to invest it, was being used by such co-executor in his business. He then knew that his co-trustee was misapplying the money, and his duty was to take measures to have it placed in better custody, and invested according to the directions contained in the will. See the language of the Lord Chancellor in *Brice v. Stokes*, 11 Ves., at p. 327. This he did not do, and I think he must be considered to have acquiesced in what his co-trustee was doing with the money. He is not in so favorable a position, I think, as a trustee who is merely negligent and does not know what is being done with the fund. He was aware of the duty to invest the money. He was aware that it was not invested, and that it was being used in the business of his co-trustee. In all this he seems to have acquiesced.

In *Sovereign v. Sovereign*, what took place was called the *spoliation* of the estate. The legal consequence was held to be liability for the value and interest thereon, and the executor who only acquiesced was held liable to the same extent as the one who did the acts, that is, for principal and interest.

In the present case, what took place was the breach of trust in not investing, and, on the contrary, using the money in the business of the trustee. The legal consequence of the act is, I think, a liability for the amount and interest with rest. The effect of the acquiescence on the part of the other trustee seems, by analogy to what was done in *Sovereign v. Sovereign*, to cast upon him the same liability as that of his co-trustee; and although I cannot say that any of the authorities that I have seen are

precisely in point, I am of the opinion that he is so liable, and I think that the appeal as to this third ground should be as it is, allowed, with costs.

The fourth ground of appeal seems to contain a sort of summary of the other grounds and is very general in character. It was not specially argued and I apprehend no judgment is expected in regard to it.

The appeal is dismissed, with costs, as to the first and second grounds, and allowed, with costs, as to the third ground.

A. H. F. L.

[CHANCERY DIVISION.]

THOROLD MANUFACTURING COMPANY v. THE IMPERIAL
BANK.

*Banks and Banking—Action to recover amount of cheque—Endorsation—
Company—Mode of conducting business.*

The I. Bank cashed a cheque payable to the order of the T. Manufacturing Company upon the endorsation of the Secretary alone, who had on several previous occasions cashed other cheques in the same way, and acted as general agent of the company.

Held, in an action by the company against the bank to recover the amount of the cheque, that the bank was justified in cashing the cheque, although the by-laws of the company required that the cheque should be countersigned by the President.

THIS was an action brought to recover the amount of a cheque paid by the defendants under the circumstances mentioned in the judgment.

The evidence was taken on October 19th, 1886, before Mr. Justice Galt, at Welland, where the argument stood enlarged to take place at Toronto, where the case was argued on November 20th, 1886.

B. B. Osler, Q. C., for the plaintiffs, cited *Daniel* on Negotiable Instruments, secs. 387, 390; *Olding v. Smith*,

16 Jur. 497; *Wilson v. West Hartlepool, etc., R. W. Co.*, 34 Beav. 186; *Re Exhall Coal Mining Co., Miles' Case*, 4 DeG. & S. 471.

Cox, for the defendants.

January 12th, 1887. GALT, J.—This action was tried before me at Welland, when judgment was reserved. The case was afterwards argued by *Osler*, Q. C., for the plaintiffs and *Cox* for the defendants.

The action is brought to recover the amount of a cheque drawn upon the defendants, by a firm doing business in St. Catharines, in payment of a debt due by them to the plaintiffs. The cheque was payable to the order of the plaintiffs, and the claim of the plaintiffs is that the defendants wrongfully paid the cheque without their endorsement.

It appeared from the evidence that the plaintiffs are a joint stock company, that is to say, certain persons had obtained letters patent of incorporation, but in reality the property of the corporation belonged almost entirely to one person, named Robert Barclay Macpherson. The letters of incorporation are dated June 7th, 1882. After the company was incorporated certain by-laws were passed one of which enumerated the officers of the company, and another the duties of the officers. The said Robert Barclay Macpherson was duly chosen president and treasurer, and his son Robert D. Macpherson was from time to time appointed secretary, and filled that office at the time when the transaction now complained of took place.

By-law 23 defines the secretary's duties as follows :

"It shall be the duty of the secretary to attend all meetings of the board of directors and of the company, enter minutes of all resolutions and proceedings in the minute book of the company and keep the accounts in order in proper books to be provided for that purpose: he shall summon the directors to all meetings, and issue all

circulars and notices to members which may from time to time be thought necessary by the directors. Conduct the correspondence of the company, and perform all other duties that the nature of his office may require."

By-law 24 defines the duties of the treasurer:

"It shall be the duty of the treasurer to receive all moneys, notes, bills of exchange, and other securities for or on behalf of the company, and the treasurer shall forthwith deposit all such moneys, notes, bills of exchange and other securities as he shall receive on account of the company to the credit of the company in a bank to be chosen by the directors, and be empowered to endorse all such notes, bills of exchange, and other securities for the depositing of the same, which sum or sums shall only be drawn out of said bank upon the cheque of the secretary countersigned by the president or vice-president."

It appears from the foregoing that all moneys should be received by the treasurer, and deposited by him to the credit of the company, and should be drawn out on cheques made by the secretary and countersigned by the president.

From the evidence of Alexander McLaren it was shewn that on September 2nd, 1886, his firm were indebted to the plaintiffs in the sum of \$1,882.45, made up of amount of notes not then due, amounting to \$1,248.70, and of goods sold on 23rd August, \$633.75, in all \$1,882.45.

Robert B. Macpherson in answer to the question: "You sent your son down to settle for the various lots of goods sold to McLaren? Yes. On the first occasion he brought you back the two notes? Yes. And what was done? They were deposited in the safe in our office. And remained there until he took them down to McLaren on the last occasion? Yes. On the last goods being sent down to McLaren & Co., did you send him down to collect the money for them? Yes, to get the money or a note. And on that occasion he took down the other notes and got this cheque in question? Yes. What was the amount of the bill of goods for which you sent him down to get the money on the last occasion? Upwards of \$600."

I have already stated that although the plaintiffs are an incorporated company, the company really belongs to this witness.

It appears, then, that on the occasion which has led to this litigation he sent his son down to receive this money, and there can be no question the son had a right and authority to settle with Mr. McLaren; he did so, and received the cheque now in dispute. He then took the cheque and indorsed it in the name of the plaintiffs, signing his name as secretary; it was proved at the trial that on several previous occasions he had done the same thing with cheques drawn by customers of the plaintiffs on the defendants, viz., on 15th September, 1884 a cheque for \$295.50; on 6th October, 1884, \$20; on 5th November, 1884, \$241.50; and on 23rd November, 1885, for \$179.15, so that the defendants had no reason to believe that he was exceeding his authority when he endorsed this cheque.

By the 17th condition endorsed on the letters patent, it is expressly provided, that "every contract, agreement, or bargain made and every bill of exchange drawn, accepted or endorsed, and every promissory note and *cheque* made, drawn or *endorsed* on behalf of the company by any agent, *officer or servant* of the company, in general accordance with his power as such under the by-laws of the company, shall be binding upon the company, and in no case shall it be necessary to have the seal of the company affixed to any such contract, agreement, bill of exchange, promissory note, or cheque, or to prove that the same was made, drawn, accepted, or endorsed, as the case may be, in pursuance of any by-law or special vote or order."

In the present case it was proved that Robert D. Macpherson was the secretary of the company, and acted as the general agent of the company; and it was shewn that he had on several occasions done precisely what is complained of, viz., drawn money on cheques on the defendants payable to the order of the company, and that no notice whatever was given to the defendants that he was exceeding his authority in so doing.

In my opinion the plaintiffs have no claim against the defendants. They have been defrauded by the act of their own agent ; and I dismiss the action, with costs.

A. H. F. L.

NOTE.—This case was afterwards set down for argument before the Divisional Court by way of appeal, but the appeal was withdrawn before argument.—REF.

[QUEEN'S BENCH DIVISION]

MURPHY V. THE CORPORATION OF THE CITY OF OTTAWA
AND DANIEL DOYLE.

*Municipal corporation—Contract for construction of sewer—Contractor and sub-contractor—Master and servant—Interference by corporation in-
spector—Joint wrongdoers—Liability—Compensation.*

The corporation of the city of Ottawa contracted with defendant Doyle to lay down sewer pipes on certain streets in the city of Ottawa, and by their engineer and inspector the corporation exercised superintendence over the work as it progressed.

Doyle employed one McCallum to engage workmen and oversee the work: McCallum engaged Murphy, the husband of the plaintiff.

During the progress of the work the sides of the sewer caved in through the faulty and negligent shoring of the walls thereof, thereby causing the death of Murphy.

Held, that under the evidence, the corporation were not liable: that no recovery ought to have been had against either of the defendants, as there was no evidence from which it could have been reasonably inferred that the deceased was ignorant of the dangerous character of the work he was engaged in, of which he had quite as much knowledge and means of knowledge as his master, and with the knowledge of which he voluntarily engaged in it ; but, as defendant Doyle had not moved against the verdict found against him, it was therefore allowed to stand.

Held, also, that the corporation by their inspector had not so interfered with the conduct of the work by the deceased as to assume personal control over the deceased within *Stephen v. The Commissioners of Police of Thurso*, 3 Court of Session Cases, 4th Series, 535, per Gifford, L. J.

Held, also, that the action being founded on the relationship of master and servant, both defendants could not be held liable, and that the plaintiff, by retaining her judgment against Doyle, had elected to treat the wrongful act or omission as his, and had therefore no recourse against the corporation.

THIS action was brought by the plaintiff, as the administratrix of her deceased husband John Murphy, under the

Act R. S. O. cap. 128, to recover damages from the defendants for herself and her infant child, for the death of her said husband, caused, as she alleged, by the negligence of the defendants, and by her statement of claim she alleged that (2) the defendants, the corporation, employed the defendant Doyle to lay down sewer pipes along King street in the City of Ottawa, and to that end to make the necessary excavation along said street. (3) That the corporation by their inspector exercised superintendence over the performance by Doyle of said work, and actively interfered therein during the progress thereof. (4) That Doyle gave to and entrusted one McCallum with the duty of overseeing said work, and employing the workmen required thereon, and the entire superintendence of the doing thereof, subject only to the general superintendence of the corporation exercised through the said inspector. (5) That Doyle by and through the said superintendent employed Murphy as a laborer upon said work. (6) That in carrying out said work an excavation was made along King street of a depth of about 17 feet, and it became and was the duty of both defendants to brace, or caused to be braced, the sides of said excavation with such reasonable care as to prevent the caving in of the same to the injury of said Murphy and the other laborers employed in the excavation; yet McCallum, with the knowledge and consent, and under the superintendence of the said inspector, negligently caused the sides of the said excavation to be so badly and insufficiently braced that, as both defendants well knew or should have known, it was dangerous to said Murphy and the other labourers employed therein. (7) That Murphy was ignorant of the fact that the bracing of said excavation was insufficient or dangerous in every particular. (8) That in selecting said McCallum to superintend as aforesaid, defendant Doyle did not exercise reasonable and proper care with a view to insuring the safety of said Murphy and the other workmen employed in the said excavation, said McCallum being wholly unfit and incompetent to perform properly the duties imposed upon him, as both defendants

well knew, or should have known. (9) That Murphy was ignorant of such incompetency. (10) That said excavation, as both defendants well knew, required to be dug through a sandy soil, whereby said excavation required to be at all times well, sufficiently and skilfully braced and managed, in order to preserve said excavation safe for said Murphy and the other labourers employed therein. (11) That on the 4th August, 1886, and while said excavation was in the said plight and superintended as aforesaid, and while said Murphy was in the course of his employment working in the said bottom of said excavation, he was negligently ordered by said inspector to dig into the side of said excavation, and said Murphy not knowing it was dangerous so to do, did so commence to dig into the side of said excavation, whereupon by reason of the premises, and of the insufficiency of said bracing, the sides of said excavation caved in upon said Murphy, and he was killed.

The defendants, the corporation, denied the allegations in the statement of claim, and said (2) that by articles of agreement dated the 11th September, 1885, the defendant Doyle, who was a careful and experienced contractor, contracted with the corporation to construct certain sewers, and to do and perform the necessary excavations therefor, in and along certain streets in the City of Ottawa, among others the King street referred to in the second paragraph of the plaintiff's statement of claim, which said sewers and excavations, when completed and refilled to the satisfaction of said corporation, were to be paid for at the figures mentioned in said articles of agreement. (3) That under and by virtue of said articles of agreement defendant Doyle was, in reference to said sewer on King street, an independent contractor, and not in any sense in the employment of the corporation, or under their control in the manner of his performance of said contract, or as to his conduct of said works necessary for the performance of the same. (4.) That the accident mentioned in the 11th paragraph of the statement of claim was not

caused by any neglect, default, or mismanagement on the part of the corporation. (5) That if the caving in of said excavation was caused by negligence it was caused by the negligence of said Murphy, or by the negligence of some of his fellow workmen. (6) That Murphy might, by the exercise of ordinary and reasonable care and caution, have prevented the caving in of said excavation, and might have avoided all injury resulting therefrom. (7) That Murphy was well aware of the dangerous nature of the employment he was engaged in before and at the time he entered into the employment of the defendant Doyle; and the corporation charged that Murphy brought upon himself voluntarily all the risks incident to his said employment. (8) That the statement of claim disclosed no cause of action against the corporation.

Issue.

The cause was tried at the last Fall Sittings of this Court at Ottawa, before Galt, J., and a jury.

It appeared that by agreement entered into between the defendant corporation and the defendant Doyle on the 11th September, 1885, defendant Doyle covenanted with the corporation that he would, at his own expense, and to the satisfaction of the engineer of the corporation, do the excavation and refilling of the trenches and laying of the necessary pipes for sewers in, among other streets of Ottawa, that part of King street from Rideau street to Somerset street, crossing Besserer, Daly, Stewart, Wilbred, and Theodore streets: that he would furnish all materials and all tools and implements necessary for the performance of the work: that he would in all things about the said works obey and follow the instructions of the said engineer: that the specifications and conditions thereto annexed should form part of the contract. The specifications and conditions provided, among other provisions, the following: "The contract will embrace all excavation and refilling required, also the laying of the vitrified clay pipe, the whole to conform to the lines, grades and sizes shewn on the plans and sections accompanying the specifications, and according to

instructions given by the city engineer during the progress of the works: the contractor to find all material except the pipes, with the necessary tools, shoring timber, &c.: the ground or other material to be excavated in such place or places, and in such a length at one time as shall be desired by the city engineer: the width of the trench for the clay pipes to be opened of sufficient width at top, according to the nature of the ground, to allow the necessary width at bottom of trench, which in every case shall be at least one foot wider than the greatest horizontal outside diameter of the pipes: all junction pipes, traps, and connections must be laid where directed by the engineer: a galvanized iron wire to be attached to the connection, and extended to surface of ground, in order to mark the locations of the junctions, &c.: the contractor shall provide suitable shoring for the trenches of pipe drains, which shall be substantially shored when ordered by the engineer: no slides will be paid for, but the contractor will be required to shore where there is any risk of slides, and the act of such shoring is to be covered by his tender: the contractor will be held responsible for all damages caused to the streets or adjoining property by slides: the trenches for drains must be opened only in such streets as shall be designated by the engineer, and to such extent, and no further, as shall be laid out by him: in the absence from the works of the contractor, his agent, foreman, or other person in charge for him, shall be considered as acting in his place, and all orders or instruction given to such agent, or other person, by the city engineer, shall be as binding on the contractor as though given to himself in person: wherever the 'city engineer,' or 'engineer' occurs in this specification, it shall be taken to mean the city engineer, his assistants, inspectors, or other officers appointed by him to superintend the works."

The defendant Doyle alleged that prior to the injury complained of he had sublet the work to one McCallum, whose hired men, including the deceased, were doing the

work when the injury complained of happened. The place where the injury happened was on King street, ten or fifteen feet north of the southern limit of Daly street, and the trench was from sixteen to seventeen feet deep, and these lengths of pipe lead north of the southern limit of Daly, and deceased was engaged in the pipe laying when the sides of the trough fell in and killed him. Patrick Murphy, a fellow workman, who was present at the time of the accident, said that deceased had gone home to change his clothes, and after coming back he told one Robb, who had been laying pipe in the bottom of the trench while he was away, to come up and he went down in his place, and shortly after the accident happened: that he (witness) had seen Gibson, the inspector of the drain there that morning: that he heard him give directions to put in this upright pipe.

The inspector of the drain stated that he was under the orders of the city engineer. His duties, principally, were to lay off the direction of the drain, paying particular attention to its depth and grade, taking the depth every fifty feet and seeing that the pipe was properly cemented and joined.

On the day of the accident he had given some directions as to the length of pipe to be laid with a view to preventing its rising too high or otherwise according to the depth of the side drain and trunk sewer, and he left the scene of the accident after giving the directions and did not return until after the accident had happened. The deceased was not present when these orders were given. The drain was about sixteen feet deep, was shored with two inch plank placed upright on each side, with longitudinal pieces at the bottom of the drain and at the top, and another piece midway between them. Main braces were placed at distances varying from four to ten feet. It was shored where the accident happened. He had on more than one occasion given advice as to the shoring, and cautioned those working in the drain to be careful. The engineer had done the same. He saw no signs on the day of the accident of the drain being in a dangerous state.

It was the engineer's duty to see that the drain was of proper width at the bottom and the top.

It appeared also that the deceased was a reliable man of considerable experience in digging, and had been working on these drains from 10th or 11th July, to the 4th of August, principally pipe laying and making the necessary excavation at the bottom of the drain to fit the pipe in.

The learned Judge submitted certain questions to the jury, which, with the answers of the jury given to them, were as follow :

As respects the corporation, did the corporation through their officer interfere with the conduct of the work ? The jury cannot agree.

If so, did such interference lead to the happening of the accident ?

As regards defendant Doyle, was the deceased at the time of the accident in the employ of the defendant, or of McCallum ? Of Doyle.

Was the shoring at the time of the accident reasonably secure ? It was not.

What is the amount of damages ? Seven hundred dollars.

The learned Judge thereupon dismissed the action against the defendant corporation, and directed judgment against the defendant Doyle for the sum of seven hundred dollars and costs.

On the 19th day of November, 1886, *Osler*, Q.C., obtained an order *nisi* calling upon the defendant corporation to shew cause why, all the facts and materials for so doing being before the Court upon the evidence at the trial, the judgment for them should not be set aside and judgment entered against them for the sum of seven hundred dollars, being the amount of damages assessed ; or why a new trial should not be had against said corporation on the question of liability only ; or why the unanswered questions submitted to the jury should not be ordered to be submitted to another jury.

On the 2nd December, 1886, *Lount*, Q. C., shewed cause. *McCarthy*, Q.C., supported the order *nisi*.

The defendant Doyle did not move against the judgment.

March 11, 1887. ARMOUR, J.—The plaintiff has not moved against the judgment recovered by her against the defendant Doyle, nor has the defendant Doyle moved against it; it therefore stands in full force.

The judgment against Doyle is founded upon the relationship of master and servant having existed between Doyle and the deceased, and by reason of the negligence of Doyle, the master, having caused the injury complained of to the deceased, his servant; and it is now contended that the plaintiff should also recover judgment for the same injury against the defendant corporation, founded upon the relationship of master and servant having existed between the corporation and the deceased, (created by the interference of their inspector), by reason of the negligence of the corporation, the master, causing the injury complained of to the deceased, its servant.

The action is founded upon the relationship of master and servant, and the wrongful act or omission, if such there was, which occasioned the injury complained of, was the wrongful act or omission of the one master or of the other, of Doyle or of the corporation, but not of both, and both cannot be held liable for it, and the plaintiff by retaining her judgment against Doyle has elected to treat the wrongful act or omission which occasioned the injury complained of as his, and is not now entitled to insist upon its being the wrongful act or omission of the corporation, and to recover judgment for it against the corporation.

In the view I take of the evidence I am of opinion that no recovery ought to have been had against either of the defendants. There was no evidence to shew, nor was there any evidence from which it could have been reasonably inferred, that the deceased was ignorant of the

dangerous character of the work he was engaged in. From all that was shewn or appeared in evidence, he had quite as much knowledge of its dangerous character as his master, and voluntarily engaged in it knowing its dangerous character. See *Griffiths v. London and St. Katharines Docks Company*, 12 Q. B. D. 493, 13 Q. B. D. 259. Nor do I think that the evidence established that the inspector of the defendant corporation interfered with the conduct of the work by the deceased in such a manner or to such an extent as to assume personal control over the deceased, within the opinion, relied upon by the plaintiff's counsel, of Lord Gifford in *Stephens v. The Commissioners of Police of Thurso*, 3rd vol. Ct. of Sess. Cas. 4th series, 535. Nor do I think that there was any evidence from which it could have been reasonably inferred that such interference occasioned the injury complained of.

In my opinion the order *nisi* must be discharged, with costs.

WILSON, C. J., and O'CONNOR, J., concurred.

Order nisi discharged, with costs.

[COMMON PLEAS DIVISION.]

COCKBURN V. THE MUSKOKA MILL AND LUMBER
COMPANY.

*Locatee cutting timber for clearing—Timber licensee—R. S. O. ch. 24—
43 Vict. ch. 4 (O.)—Damages—Loss of profits.*

Under sec. 10 of R. S. O. ch. 24, as amended by sec. 2 of 43 Vict. ch. 4 (O.), the locatee of land, "may cut and use such pine trees as may be necessary for the purpose of building and fencing on the land so located, and may also cut and dispose of all trees required to be removed in the actual clearing of such land for cultivation, but no pine trees (except for the necessary building aforesaid) shall be cut beyond the limit of such actual clearing."

Held, that there was nothing to prevent the locatee cutting, clearing and cultivating the land in several parcels in various shapes and forms, so long as done in good faith for the purpose of clearing and cultivating, as was found to be the fact here; it not being necessary that the clearings should be together and contiguous: that the locatee may cut such pine trees necessary for building and fencing wherever he chooses on the land, but they can be only used for such purpose, but when the trees are cut in the actual process of clearing for cultivation they may be sold and disposed of.

Trees cut by the locatee in the actual process of cultivation were sold to the plaintiff a mill owner, and were seized by the defendants the timber licensees who also had a mill, and were taken by them thereto and cut up into lumber. It was proved that the plaintiff could not get other logs at that season of the year.

Held, CAMERON, C. J., dissenting, that the plaintiff was entitled to the loss of profits sustained by him by being deprived of cutting the logs into lumber at his mill.

THIS was an action brought by the plaintiff for the taking and conversion of a quantity of logs, some 5,000 feet which had been cut on lots 14 and 15 in the 8th concession of the township of Wood, in the Muskoka district.

The defendants by their statement of defence set up that they were the holders of certain licenses from the Crown, under which they were entitled to take and keep exclusive possession of the said lands, and by virtue whereof there became vested in them all rights of property whatsoever in all pine trees, pine timber, and pine lumber cut upon the said lands, and the right to follow and seize the same whenever the same might be found in the possession of any unauthorized person; that the defendants found in the possession of the plaintiff, an unauthorized person, the

said logs, which had been cut in trespass upon the said lands during the currency of the defendant's license, which were the acts complained of by the plaintiff.

The plaintiff replied that the said logs were bought from the locatee of the lands, who had cut the same on the said lands in the actual clearing of said lands for cultivation.

The action was tried before Armour, J., and a jury, at Barrie, at the Spring Assizes, of 1886.

The lots were located by Martin Willison, but the sale was made by his nephew Ouloff Willison, who by agreement between himself and Martin was to have a conveyance of lot 15.

At the trial the learned Judge found for the plaintiff, assessing the damages at \$193.50; and gave judgment for that amount, and full costs of suit.

In Easter Sittings, *J. H. Mayne Campbell*, moved on notice to set aside the judgment entered for the plaintiff, and to enter judgment for the defendants; and *Pepler* moved to increase the plaintiff's damages.

Robinson, Q. C., supported the defendants' motion, and shewed cause to the plaintiff's and referred to R. S. O. ch. 24, sec. 10, as amended by 43 Vic. ch. 4, sec. 2, (O.); *United States v. Nelson*, 5 U. S. Cir. Ct. (Sawyer) 68; *United States v. Lane*, 19 Fed. R. 910; *United States v. Williams*, 18 Fed. R. 475; *Davis v. Canadian Pacific R. W. Co.*, 12 A. R. 724; *Walker v. Rogers*, 12 C. P. 327.

Pepler, contra, referred to *Auger v. Cook*, 39 U. C. R. 537; *Mayne on Damages*, 4th ed., 50, 377; *Sedgwick on Damages*, 7th ed., sec. 80; *Elbinger Actien Gessellschaft v. Armstrong*, L. R. 9 Q. E. 473, 476.

December 24, 1886. ROSE, J.—The plaintiff claims under the locatee of lots 14 and 15, in the 8th concession of Wood, certain pine logs purchased by him from the locatee, and seized by the defendant company, which claimed them under a license, dated 1st May, 1884.

The question is, whether the trees cut were "required to be removed in the actual clearing of said land for cultivation," within the meaning of sec. 2 of 43 Vic. ch. 4, (O.), repealing sec. 10, of R. S. O. ch. 24, or were "necessary for the purpose of building and fencing on the said land" within the same section.

The locatee cut the pine on lot 15 in two separate places of about one and a half acres each. There was some cut around the dwelling house on lot 14, but it was not kept separate.

The lots were in the name of Martin Willison. The sale was made by his nephew Ouloff Willison, who was, by agreement between himself and Martin, to have a conveyance of lot 15.

As Mr. Robinson practically abandoned any question as to the right of the Willisons to make the sale if the pine was cut in good faith in the clearing of the land, and was necessary for the purpose of building and fencing, I do not further consider the title of either of the Willisons.

Mr. Robinson's contention was, (1) that the trees were cut for purpose of sale, and not in the actual clearing of the land for cultivation: (2) that it was not permissible to cut in patches on the lot, the statute declaring that "no pine trees (except for the necessary building and fencing as aforesaid) shall be cut beyond the limit of such actual clearing:" (3) that where pine had been cut in the actual clearing for cultivation it must be used for any building and fencing to be erected on the lot, and that while it remained on the ground it was not "necessary" to cut other pine for building and fencing.

I have little doubt on reading the evidence that the Willisons were influenced, in cutting the trees as they did, by the fact that they might be able to dispose of them, and thus realize some money to assist them in clearing and cultivating.

The land is rocky and, on the whole, very poor, and yields a very light return for labor, although the patches of good soil are said to yield fair crops; and I can well

conceive that a settler might determine to clear those portions first on which were the pine trees as from their sale he might realize money to enable him to prosecute his work.

Of course irregular work would lay him open to suspicion, and would no doubt be dangerous, as if a finding of fact should be against his good faith he might find it almost impossible to obtain a reversal of such finding.

Assume, however, good faith, and I see nothing in the section to prevent a settler cutting, clearing and cultivating his land in several parcels in various shapes and forms, here a triangle, there a square, and in another place a circle or any irregularly shapen piece, as his judgment or want of judgment, might determine.

Of course, as I have said, such action would give rise to suspicions; and the settler, however good his intentions, might find himself landed in trouble from which he could not be relieved.

I do not think the restriction that "no pine trees (except &c.) shall be cut beyond the limit of such actual clearings" prevents such a construction, else a settler would be unable to clear his lot except by commencing at say the front and clearing ahead in regular progression, preserving a straight face line until the rear of his lot was reached.

It seems to me that restriction meant that when a settler commenced clearing whatever places he desired to clear he must clear clean for the purpose of cultivation; and he is not permitted to go over his lot and cut the pine trees here and there for the purpose of sale.

It is a question of fact. There must be the primary object of cultivation; and, in carrying that out, the settler may cut and dispose of all trees required to be removed in the actual clearing of the said land for cultivation.

In this case, were I Judge of first instance, I might have difficulty in finding in favor of the contention that the trees were so cut; but Ouloff Willison has so sworn; other witnesses have corroborated him; the learned Judge at the trial has so found, and, although Willison's conduct may be open to question and raise suspicions, it may be his

intentions were in good faith to clear the land for cultivation.

I am unable to disturb the finding of fact in the plaintiff's favor.

As to the third question : that in the words of the section the locatee " may cut and use such pine trees as may be necessary for the purpose of building and fencing on the land so located, *and may also* cut and dispose of all trees required to be removed in the actual clearing of said land for cultivation, but no pine trees (*except for the necessary building and fencing as aforesaid*) shall be cut beyond the limit of such actual clearing," I see no restriction in the section upon the locatee cutting such pine trees as may be necessary for the purpose of building and fencing wherever he may choose on the lot ; and also cutting and disposing of *all* trees, including pine, required to be removed in the actual clearing of the land for cultivation.

I think the defendants' motion must be dismissed, with costs.

The plaintiff moves to increase the damages by the loss of profits, relying upon *Auger v. Cook*, 39 U. C. R. 537.

The evidence is brief and uncontradicted, not even cross-examined upon.

The plaintiff, at p. 19, gives in detail the items of cost in bringing the logs to the mill, sawing, &c. ; and then says that the cost would have been \$6.50 per thousand feet, and the value \$9.50 per thousand feet.

He was asked : " Could you have replaced these logs on the 13th of May ? A. No. Q. By the time May is reached are there any logs to be procured ? A. Sometimes, but as a rule they are generally sold. Q. This particular year could you have got the logs elsewhere ? A. No, I would have been very glad to get them if I could."

The defendants being engaged in the lumber business of course knew what the plaintiff purchased the logs for. The language of the judgment in *Auger v. Cook*, 39 U. C. R. 537, at p. 544, is : " The plaintiffs and the defendants at the time of the wrong of which plaintiffs complain were to the

knowledge of each other getting out logs to be cut into lumber at a profit. Loss of profits must therefore be held to be present in the minds of the defendants when depriving the plaintiffs of their property * *. Had it been shewn that the plaintiffs could, at the time and place where the wrong was done, have gone into the market and purchased other logs for the purposes of their business it might, with some reason, have been argued that the price paid for the substituted logs would be the proper measure of damages. But there was no evidence of the kind. And in the absence of such evidence we cannot say we feel any doubt as to the right of the plaintiffs to recover against wrong-doers for loss of profits."

The above language seems especially applicable to the facts of this case.

The defendants in both cases were wrong-doers; and I do not see that there is any difference in the measure of damages in the case of wrong-doing by negligence, and in the case of wrong-doing in the assertion of a supposed right.

I cannot distinguish the cases on any fair reading of *Auger v. Cook*; and I think the plaintiff's motion must be made absolute, with costs.

I have not the exact number of feet allowed by the learned Judge at the trial. Counsel no doubt marked the calculation on their briefs, and will be able to agree.

Since writing the above my brother Galt points out an additional reason for holding the defendant company liable for the profits, viz., that it has, no doubt, converted the logs into lumber and earned the profit of which the plaintiff has been deprived.

CAMERON, C. J.—I concur in the opinion of my learned brother Rose just pronounced, that the defendants' motion must be dismissed. The property in the pine trees on the lands in question no doubt was vested in Her Majesty, subject to the rights granted by license to the defendants to cut and remove the same at their pleasure during the

continuance of their license, and subject to the further right of the locatee or purchaser, or those claiming lawfully under them, firstly, to cut where he or they pleased on the land all such pine trees as should be "necessary for the purpose of building and fencing on the land;" and secondly, to "cut and dispose of all trees required to be removed in the actual clearing of said land for cultivation." The pine trees cut otherwise than for the purpose of clearing for cultivation may not be disposed of, but must be used for building or fencing on the land. The trees cut in the actual process of clearing for the purpose of cultivation may be sold and disposed of subject to the payment of dues. The primary object which justifies the cutting under the second class or head must be the clearing of the land for cultivation; and the trees must be cut in the process of the clearing, and not beyond the limit of the clearing. The enactment does not in any manner define the shape of the clearing, nor the point of commencement. That is left to the judgment and discretion of the locatee.

It was urged upon us that, by reason of the trees in question having been cut from different patches, and the clearings not being together and continuous, it should be presumed the object with which the clearings were made was not cultivation but the acquirement of the pine trees. No doubt this would be a cogent circumstance in determining what was the object with which the trees were cut, but it certainly is not positive or irrebutable evidence that such was the object.

It is sworn that the object with which the trees were cut was the clearing of the land. The learned Judge believed the witnesses, adopted that view, and gave judgment for the plaintiff accordingly. I cannot say that he should not have believed the witnesses and adopted that view, and cannot, therefore, say the judgment in favor of the plaintiff is wrong and unsupported by the evidence.

I think there can be no question that by the language of sec. 10 of R. S. O. ch. 24, as amended by 43 Vic. ch. 4, sec. 2 (O.), the locatee may cut where he pleases on his land

pine trees for the purposes of building and fencing, though he may have cut within his clearing sufficient for his building and fencing purposes.

In the first branch of the clause the permission to cut is given in respect of "such pine trees as may be *necessary for the purpose of building*;" but in the latter part, in the prohibitory clause, the language is changed, the provision being, "but no pine trees (except for the necessary building and fencing as aforesaid) shall be cut beyond the limit of such actual clearing." Under the first expression "necessary" might mean such as the locatee actually needs and requires for the purpose of building; and, if he has already cut on his clearing and has in his possession at the time he requires to build sufficient for that purpose, and then cuts beyond the limit of his clearing, the trees so cut are not necessary for building and fencing: while under the words "for the necessary building and fencing," the only limitation to the right to cut is the building and fencing actually needed on the place by the locatee. And, taking the two expressions together, the effect of the clause is, that the locatee may take what he requires for building and fencing anywhere within the boundaries of his land; but he may not sell or dispose of any pine cut except in the process of clearing.

With regard to the motion of the plaintiff to increase the damages awarded by the learned Judge by the amount the plaintiff would have realized by the conversion of these logs into lumber, I am unable to agree in the conclusion at which my learned brother has arrived.

No doubt under the authority of *Auger v. Cook*, 39 U. C. R. 537, cited on the argument and followed by my learned brother, it would be competent to award loss of profits to the plaintiff, but profits are problematical and a jury would not be bound to allow them.

The learned Judge has not thought fit to do so, and I see nothing in the circumstances of this case to vary from the ordinary rule in such cases, which, as I understand it, is to give the person deprived of his property by trespass

its full value as it was at the time of the trespass, and not what that value might be after labor and money had been expended on it. The defendants here were acting in good faith, and I am by no means certain, were I the Judge of first instance, that I might not have held the defendants were entitled to succeed as to a portion of the logs, the evidence going far to support the contention that the trees were cut with the primary object of sale and not of clearing for cultivation. Then to increase the damages as asked would give rise to this singular condition of things. If the logs had been taken while the locatee owned them and held them for sale, he would only be entitled to recover for the wrongful conversion the full value at the place where taken, while being taken after their sale, though only the next day, to the mill owner, the latter would be entitled to recover their value at a future time with that value enhanced through additional labour having been put upon the logs. Thus the same trespass committed against the same property would, by reason of the different ownership thereof, entail different consequences; and one man would recover under the law larger compensation for a like wrong.

I do not think there is any express rule of law that requires me to adopt the measure of damages contended for by the plaintiff; and justice, as it is commonly understood, does not.

I am, therefore, of opinion the plaintiff's motion, should be dismissed, with costs.

GALT, J., concurred with ROSE, J.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

RAE V. McDONALD ET AL.

Bankruptcy and insolvency—Fraudulent preference—Insolvency—What constitutes—R. S. O. ch. 118, 48 Vic. ch. 26, s. 2 (O.)—Dower—Judgment creditor—Trial of equitable issues by jury—Entry of judgment by Divisional Court.

The meaning of R. S. O. ch. 118, as amended by 48 Vic. ch. 26, sec. 2 (O.), is that a conveyance of property which has the effect of defeating, delaying, or prejudicing his creditors, or of giving a preference, is utterly void when made by a person at a time when he is in insolvent circumstances, or unable to pay his debts in full, or knows that he is on the eve of insolvency.

In an action by the plaintiff, a creditor, to set aside a mortgage made by the debtor to the defendant M. Held on the evidence, the debtor was insolvent when he made the mortgage, whereby the defendant obtained a preference over the other creditors, including the plaintiff, and that the mortgage must be set aside.

Held, also following *McDonald v. McCall*, 12 A. R. 593, a creditor to maintain the action need not be a judgment creditor.

Per ROSE, J., a debtor is legally insolvent when he has not sufficient property to pay all his debts if sold under legal process; and commercially insolvent when he has not the means to pay off and discharge his commercial obligations as they become due in the ordinary course business.

Per CAMERON, C. J.—In determining whether a debtor is insolvent, &c., his assets or effects are not to be estimated at what they might bring at a forced sale under execution, but at the fair value in cash on the market at any ordinary sale.

Per ROSE, J., also. Evidence of the value of the right of dower is properly admissible in determining the value of a debtor's liabilities.

Two of the debts were to relatives of the debtor, secured by mortgage and promissory notes. The learned Judge at the trial charged that because the debts were under the control of the debtor they should not be included in estimating the liabilities. *Per ROSE, J.*—This was misdirection.

Per ROSE, J., also. There is nothing to prevent a Judge directing the jury to find on equitable issues.

In this case the jury having found for the defendants, the Court, on the evidence, directed the judgment to be entered for the plaintiff.

THIS was an action brought by the plaintiff to set aside a mortgage made on the 15th October, 1885, to the defendant Alexander McDonald by the defendant James G. Leslie, who was a farmer, on the ground that at the time the said mortgage was made, Leslie was unable to pay his debts in full, and insolvent to the knowledge of the defendant Macdonald: that the mortgage was given and obtained with the intent of defeating, delaying, and preju-

dicing Leslie's other creditors, and with the view of giving the defendant Macdonald a preference. The plaintiff claimed that at the time the mortgage was made he was a creditor of the said Leslie to the amount of \$350 ; and that after the action was commenced he had recovered judgment therefor and issued execution which remained unsatisfied.

The cause was tried before O'Connor, J., and a jury, at Stratford, at the Spring Assizes of 1886.

The learned Judge left certain questions to the jury, which, with the answers, were as follows :

1. Was the defendant Leslie, in insolvent circumstances, or unable to pay his debts in full ? A. No.

2. Did the defendant Leslie know that he was in such insolvent circumstances, or that he was on the eve of insolvency ? A. He did not.

3. Did the defendant Leslie, give the mortgage to the defendant McDonald, with the intent to defeat, delay, or prejudice his creditors, or give the defendant McDonald a preference over his other creditors, or any one of them, and did the defendant McDonald take the mortgage with such intent, and agreeing to it ? A. No.

4. If the defendant Leslie did not give the mortgage with the intent mentioned in the previous (3rd) question, still had the giving of the mortgage that effect or not ? A. No.

5. If the defendant Leslie was in insolvent circumstances or unable to pay his debts in full, did the defendant McDonald know that fact when he took the mortgage ? A. No.

Upon these findings the learned Judge entered judgment for the defendants.

In Easter sittings, May 20, 1886, *Shepley* obtained an order *nisi* to set aside the verdict and judgment entered for the defendants, and for a new trial, on the grounds, (1) that the said findings of the jury were contrary to law, evidence and the weight of evidence. (2) That upon the admitted facts, and upon the whole evidence, the defendant

[COMMON PLEAS DIVISION.]

RAE V. McDONALD ET AL.

Bankruptcy and insolvency—Fraudulent preference—Insolvency—What constitutes—R. S. O. ch. 118, 48 Vic. ch. 26, s. 2 (O.)—Dower—Judgment creditor—Trial of equitable issues by jury—Entry of judgment by Divisional Court.

The meaning of R. S. O. ch. 118, as amended by 48 Vic. ch. 26, sec. 2 (O.), is that a conveyance of property which has the effect of defeating, delaying, or prejudicing his creditors, or of giving a preference, is utterly void when made by a person at a time when he is in insolvent circumstances, or unable to pay his debts in full, or knows that he is on the eve of insolvency.

In an action by the plaintiff, a creditor, to set aside a mortgage made by the debtor to the defendant M. Held on the evidence, the debtor was insolvent when he made the mortgage, whereby the defendant obtained a preference over the other creditors, including the plaintiff, and that the mortgage must be set aside.

Held, also following *McDonald v. McCall*, 12 A. R. 593, a creditor to maintain the action need not be a judgment creditor.

Per ROSE, J., a debtor is legally insolvent when he has not sufficient property to pay all his debts if sold under legal process; and commercially insolvent when he has not the means to pay off and discharge his commercial obligations as they become due in the ordinary course business.

Per CAMERON, C. J.—In determining whether a debtor is insolvent, &c., his assets or effects are not to be estimated at what they might bring at a forced sale under execution, but at the fair value in cash on the market at any ordinary sale.

Per ROSE, J., also. Evidence of the value of the right of dower is properly admissible in determining the value of a debtor's liabilities.

Two of the debts were to relatives of the debtor, secured by mortgage and promissory notes. The learned Judge at the trial charged that because the debts were under the control of the debtor they should not be included in estimating the liabilities. *Per* ROSE, J.—This was misdirection.

Per ROSE, J., also. There is nothing to prevent a Judge directing the jury to find on equitable issues.

In this case the jury having found for the defendants, the Court, on the evidence, directed the judgment to be entered for the plaintiff.

THIS was an action brought by the plaintiff to set aside a mortgage made on the 15th October, 1885, to the defendant Alexander McDonald by the defendant James G. Leslie, who was a farmer, on the ground that at the time the said mortgage was made, Leslie was unable to pay his debts in full, and insolvent to the knowledge of the defendant Macdonald: that the mortgage was given and obtained with the intent of defeating, delaying, and preju-

dicing Leslie's other creditors, and with the view of giving the defendant Macdonald a preference. The plaintiff claimed that at the time the mortgage was made he was a creditor of the said Leslie to the amount of \$350 ; and that after the action was commenced he had recovered judgment therefor and issued execution which remained unsatisfied.

The cause was tried before O'Connor, J., and a jury, at Stratford, at the Spring Assizes of 1886.

The learned Judge left certain questions to the jury, which, with the answers, were as follows :

1. Was the defendant Leslie, in insolvent circumstances, or unable to pay his debts in full ? A. No.

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3. Did the defendant Leslie, give the mortgage to the defendant McDonald, with the intent to defeat, delay, or prejudice his creditors, or give the defendant McDonald a preference over his other creditors, or any one of them, and did the defendant McDonald take the mortgage with such intent, and agreeing to it ? A. No.

4. If the defendant Leslie did not give the mortgage with the intent mentioned in the previous (3rd) question, still had the giving of the mortgage that effect or not ? A. No.

5. If the defendant Leslie was in insolvent circumstances or unable to pay his debts in full, did the defendant McDonald know that fact when he took the mortgage ? A. No.

Upon these findings the learned Judge entered judgment for the defendants.

In Easter sittings, May 20, 1886, *Shepley* obtained an order *nisi* to set aside the verdict and judgment entered for the defendants, and for a new trial, on the grounds, (1) that the said findings of the jury were contrary to law, evidence and the weight of evidence. (2) That upon the admitted facts, and upon the whole evidence, the defendant

Leslie was in insolvent circumstances, or unable to pay debts in full, when the mortgage in question was made him in favour of the defendant McDonald, and that the same was made with the intent, or in any case had the effect was proved, of giving the said defendant, McDonald, a preference over the creditors of the defendant Leslie, or over the plaintiff. (3) The learned Judge who tried the action directed the jury in telling them that as a matter of law, a debtor might not be able to pay his debts in full, and might yet be in a position to make a preferential transfer to a creditor without coming within the mischief aimed at by the statutes in that behalf, if there were property belonging to such debtor which, though not immediately available to his creditors, might, upon being realized at some time in the future, realize sufficient to pay such creditors their claims; and that a rule in this respect existed in this particular case different from the rule which exists in the case of a debtor engaged in mercantile pursuits. (4) That the learned Judge who tried the action also misdirected the jury in telling them that there was evidence upon which they might find that this action was under the control of the debtor brought for the benefit of the debtor. There was as a matter of fact no such evidence; but on the contrary, the evidence showed that this was not the case. (5) That the jury was not a proper tribunal, the action being one which, before the passing of the O. J. Act, would have been within the exclusive jurisdiction of the Court of Chancery, and that the findings of the jury, and their answers to the questions submitted to them, are therefore of no effect, and cannot support the judgment; (6) and why in the event of a trial being ordered the jury notice should not be set aside and the action tried without the intervention of a judge on the grounds set out in foregoing paragraphs; (7) and why the said findings, answers, and judgment should be set aside, and judgment, upon the evidence taken, pronounced in favour of the plaintiff, upon the grounds, first, said, or some of them, the jury notice being struck out, there being sufficient before the Court to pronounce judgment which should have been given at the trial.

wanted to give, shewed his solvent circumstances, or is unable to pay
Then as to the objection or knows that he is on the eve of insol-
offered at the commencement t to defeat, delay or prejudice his creditors,
jury notice and dispense v one or more of them a preference over
insisted on having the jrs or over any one or more of them, or
cannot object now. The effect."

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Shelpley, in reply, refe he made the conveyance was in insolvent
Moore, 3 A. R. 602. unable to pay his debts in full; for, if he

December 24, 1886. y opinion, on the undisputed facts, the
of one Leslie, brings this he effect of giving a preference, and was

and void as against cret the Legislature intended to draw some
to the defendant McEl then the condition of a man in insolvent
Leslie's farm. ing unable to pay his debts in full, and

Mr. Woods objected of insolvency.

at the time of commencing, in the view I take of this case, be
not lie lder the meaning of insolvency or insol-

This objection is dis.

donald v. McColl, 12 following definition found in *Bump's Law*

At the trial the learned bankruptcy, 10th ed., p. 813.

the jury, and on their ally insolvent when he has not sufficient
defendants to execution to pay all his debts if sold

The plaintiff now es, and commercially insolvent when he
grounds, the chief be s to pay off and discharge his commercial
law and evidence, and y become due in the ordinary course of

The plaintiff asks a perial Dictionary, pp. 1020, 1021, under
ment set aside and a y" and "Insolvent;" *Wharton's Law*
puted evidence p. 484, under "Insolvency;" *Shelford's*

The plaintiff relies cy, 3rd ed., p. 299; *Bump on Fraudulent*
26, sec. 2, (O), which ed., p. 283 to 288; *Sutherland v. Nixon*,
conveyance of real pr

21 U. C. R. 629, 633; *Hersee v. White*, 29 U. C. R. 232, 237-8; *Clarke's Insolvent Acts*, (1877), pp. 2-8.

"The term insolvency is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and its popular meaning. But it is also used in a more restricted sense, to express the inability of a party to pay his debts as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent": *Bump's Law and Practice of Bankruptcy*, 10th ed., p. 812.

Speaking of commercial insolvency, he says, same page: "Perhaps no precise rule can be laid down which will be applicable to all cases, inasmuch as the determination of each case rests largely upon its own peculiar facts. * * The question is, whether the debtor or trader is able to pay his debts in the ordinary course, as persons carrying on trade there usually do. Hence it may be, and undoubtedly is true that insolvency in commercial centres is not insolvency in small country towns. In the former places, if the debtor's paper is dishonored, his credit is gone, and he is *prima facie* insolvent; whereas in the latter localities, it is not so. Insolvency is a fact, and not a matter of definition or rule of law; and what is evidence of insolvency in London, or Paris, or New York, is not evidence of insolvency everywhere": p. 813.

As I have remarked these observations are confined to commercial insolvency.

"If a man's debts cannot be made in full out of his property by levy and sale on execution, he is insolvent within the primary and ordinary meaning of the word, and particularly in the sense in which the word is used in the bankrupt Act:" p. 413.

"If the debtor is unable to pay his debts as they become due, the burden of proving that his property is sufficient to pay his debts rests upon him," same page, citing *Re Ryan*, 2 Saw. 411.

The same author in his work on Fraudulent Conveyances above referred to, p. 285, says: "If, in the ordinary course of events, the donor's property turns out to be inadequate to the discharge of his debts, the presumption of fraud remains, although the property reserved may have been deemed originally adequate to that purpose," referring to *Blakeney v. Kirkly*, 2 Not. & McCord. 544, and other cases.

At pp. 286-7: "If he is unable to meet his debts in the ordinary course prescribed by law for their collection, or is reduced to that situation where an execution against him would be unavailing, the conveyance is void, for a solvency which the law cannot employ in the payment of the debts of an unwilling debtor is not distinguishable by any valuable difference from insolvency. The term solvency, in cases of this kind, implies as well the present ability of the debtor to pay out of his estate all his debts, as also such attitude of his property as that it may be reached and subjected by process of law to the payment of such debts."

"The question of solvency, moreover, depends not upon the nominal value of unsaleable goods, but upon whether enough can be realized from the property to pay his liabilities. Whether creditors can make their debts, if they try to enforce their collection by judicial process, is a surer test than the opinion of indifferent persons. Although the property reserved is equal in nominal value to the donor's existing indebtedness, that does not constitute such sufficient security for his debts as his creditors are entitled to require. They have the right to expect satisfaction of their debts out of his property, and he has no right, in law or morals, to throw upon them the loss which must necessarily occur in converting it into money. A scanty provision for the payment of debts will not, for this reason, render the conveyance valid. Property worth \$7,250, has been deemed insufficient to meet debts amounting to \$6,848, and property worth \$48,000 has been held not to be ample to meet debts to the amount of \$42,000."

The above citations from pp. 285-7, refer to voluntary conveyances, but seem pertinent to the enquiry in which we are now engaged.

I have made the somewhat copious extracts from both volumes as they seem to me to express in a very satisfactory manner the rules that should govern in determining the question of insolvency under our Act,

In determining the liabilities of the debtor Leslie, the learned Judge refused to allow evidence to be given of the value of the right of dower in the farm, the wife being about 39, and the husband 42 years of age.

This ground is not specifically taken in the order *nisi*, but was argued before us.

There were two mortgages on the farm, and although it has been held that the equity of redemption was not saleable under execution at law, *Donovan v. Bacon*, 16 Gr. 472 note; *Wood v. Wood*, 16 Gr. 471; questioned in *Samis v. Ireland*, 4 A.R. 118, it could be reached by proceedings in equity. See *Kerr v. Styles*, 26 Gr. 309.

I am of the opinion such evidence was improperly rejected.

I am not at all certain that the witness called would have been able to have given the evidence which the plaintiff sought to adduce. The notes are not very clear as to that, but I think the learned Judge was in error when he said, p. 64, of the notes of evidence: "I will overrule the point. I think it would be absurd to set aside the mortgage on that ground. I do not think you could set aside any instrument of that kind upon a point of that kind. I do not think that is the meaning of the statute."

In my opinion the evidence was receivable to shew what the farm would realize to the creditors when sold subject to the two mortgages and the right of dower. See *Re Robertson*, 24 Gr. 442, 25 Gr. 272 and 486; *Martindale v. Clarkson*, 6 A. R. p. 1, and *Building and Loan Association v. Carswell*, 8 P. R. 73.

In argument at the trial the value of the right of dower was stated at \$260, and before us at about \$300.

Mr. Woods, for defendants, stated the liabilities at \$7,891;
Mr. Shepley at \$8,105.

I may assume them at, say	\$8,000
Add the value of the right of dower at	260
	\$8,260

Assets—outside values at Mr. Wood's esti-	
mate—farm, say	\$6,000
Two acres additional	350
Chattels, including crop, say	2,000
	\$8,350

Leaving a margin of \$90 of assets over liabilities.

As a matter of fact the assets, when sold, did not realize by \$200 or \$300 the above values.

When we consider that there were two mortgages on the farm, one for \$2,000 and one for \$1,840 (included of course in the list of liabilities), and that it must be sold subject to the right of dower, and the chattels when sold realized a sum which would shew a deficiency of assets to meet the liabilities, it seems to me impossible to say, having regard to the above rules, that Leslie was solvent.

The learned Judge told the jury: "It is not because a man cannot immediately pay his debts in full that he should be deemed insolvent. A man having got property enough to pay his debts may not be able at a particular time to pay them off at once. He may have such property and means coming in as will enable him at a further time, with reasonable exertion, to meet his liabilities, and you ought to regard it somewhat in that light. Then his position is not to be looked at either, I think, strictly in the light of a person in commercial life, upon whom calls for payment may be made day by day; he is a farmer and not expected to meet demands exactly that way. The principal question will be, whether he owned property at that time which, with reasonable management, with proper care, and with reasonable time would enable him, if he was pressed, to pay his debts in full or not."

This I understand to be objected to, although the language is not accurately quoted in the rule.

I do not understand that there can be any difference in principle between the solvency of a farmer and a trader when we are considering whether the assets are sufficient to pay the liabilities. There is a difference, as we have seen, when one has to consider the question of inability to pay debts as they mature. A farmer who has ample property to pay his debts would not be considered insolvent although he might not have the ready money to meet certain maturing liabilities, while a trader under the same circumstances might be so considered.

I do not think the charge of the learned Judge quite full enough, and possibly the jury may have misunderstood the effect of the observations.

Two of the debts owing were to aunts of Leslie—one represented by mortgage on the farm of \$1,840, to Mrs. Tomlinson, and the other to Mrs. Fenton for about \$800 as I judge from the notes.

As to these the learned Judge said: "Now you will have to be satisfied in the first place that he was in debt, that these debts which he mentioned were *bond fide*, that is debts contracted in good faith, and in doing that you have a perfect right to consider whether these debts to the near relatives were *bond fide* ones or not. According to his evidence it seemed pretty evident that some of them at least were under his control. The debts to the two aunts the deed to his brother, for instance, and I think another one * * You have also to reflect back and consider whether these debts that have been mentioned, because it comes to a pretty close thing—there is not a very large margin one way or the other—if you think the debt to the aunts or any one of them is such as Leslie could control, as he pleased, it is hardly such a debt as should be taken into consideration."

The objection to this in the order *nisi* is, that there was no evidence upon which they might find "that this action was under the control and brought for the benefit of the debtor."

I do not find any such statement made, and counsel at the trial objected "that you should not have told the jury that such a debt as the aunts if under his control that they should discard that. I object to that because if the debts were due, even if the defendant Leslie may have by moral suasion the power to control it, yet the jury should not have been told that that would affect the plaintiff's rights. The plaintiff cannot exercise that moral suasion."

I have not been able to convince myself that the evidence warranted the observations of the learned Judge.

The debt to Mrs. Tomlinson, though composed no doubt largely of liberal interest, seemed to have been from time to time acknowledged by the debtor Leslie, who gave a note and renewals and a mortgage, and at the time of the trial a judgment had been obtained against him. Nor do I see that the evidence as to Mrs. Fenton's debt shewed any power by the debtor over it which would entitle the defendants to have it removed from the list in whole or in part.

Primâ facie they were liabilities, and the creditors were entitled to have them so regarded, unless on clear evidence they were shewn to have been created for the purpose of shewing the debtor to be insolvent, or to protect his estate, they being without foundation in whole or in part. Their creation was long prior to any possible fear of insolvency, and it was part of the defendants' case that the debtor did not believe himself to be insolvent.

When the margin was so small, I cannot say such observations did not turn the scale.

In fine, I am of the opinion that there was error at the trial.

1. In rejecting the evidence as to the value of the right of dower.

2. In directing the jury as to the difference between a farmer and a trader without guarding such direction by stating that there was no difference in principle when the question to be determined was whether there were assets out of which the liabilities could be collected, if necessary, by levy and sale under execution.

3. In directing the jury that "it seemed pretty evident that some of them" (the debts) "at least were under his" (Leslie's) "control."

The plaintiff is, therefore, entitled to have the verdict and judgment set aside.

I think there is no necessity for a new trial, for on the undisputed testimony I think Leslie was clearly in insolvent circumstances, and that the conveyance in question had the effect of giving the defendant a preference over the other creditors of Leslie, and hence is utterly void.

There should be judgment for the plaintiff so declaring, and granting the further relief claimed, with costs of suit.

It was objected by the plaintiff that as the trial was conducted before a jury there was in fact no trial, or, in the words of the order *nisi*: "That the jury was not the proper tribunal, the action being one which, before the passing of the O. J. A., would have been within the exclusive jurisdiction of the Court of Chancery, and that the findings of the jury and their answers to the questions submitted to them are therefore of no effect and cannot support the judgment."

I do not find that any objection was taken at the trial, and even if it would have had force there, it is now too late. It is within the power of a Judge to order equitable issues to be tried by a jury: See *MacLennan's* Judicature Act, 2nd ed., p. 62, and counsel not having objected at the trial it will now be considered what was then done was with their consent. See *Broom's Legal Maxims*, 5th ed. p. 138, where, citing *Morrish v. Murrey*, 13 M. & W. 52, and other cases, it is said "the silence of counsel implied their assent to the course adopted by the Judge, and 'a man who does not speak when he ought, shall not be heard when he desires to speak.'"

CAMERON, C. J.—I concur in the result of my learned brother's judgment, and will add but a few words to what has fallen from him. It will be observed, as he has pointed

out, that one of three things must occur before a gift, conveyance, assignment, or transfer, delivery over or payment of any goods, chattels or effects, or of any bills, bonds, notes, securities, or of any shares, dividends, premiums, or bonus in any bank, company, or corporation, or of any other property, real or personal, can be impeached by a creditor under R. S. O. ch. 118, as amended by 48 Vic, ch. 26, sec. 2. The person making the disposition of his property by any of the modes indicated, must (1) at the time be in insolvent circumstances, or (2) be unable to pay his debts in full or know that he is on the eve of insolvency; and one of these conditions existing, one of two other things must also exist : (1) The disposition must be made by the owner of the property with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over any one or more of them, or (2) it must have that effect.

What constitutes insolvency, it may not be easy to define satisfactorily. But as the Act is general, applying to all persons and not merely to traders, in respect to whom special insolvency or bankruptcy laws have been enacted, and will probably in the future be re-enacted, the generally accepted and understood meaning of the term insolvent must be taken to be what the Legislature intended by it in ch. 118. In that general sense an insolvent is a debtor unable to pay his debts, and a person in insolvent circumstances is one not having money, goods, or estate sufficient to pay all his debts. Thus the use in the statute of the alternative "or unable to pay his debts in full," was but explanatory of the term "insolvent circumstances." And one on the eve of insolvency may be defined to be one who knows that he has obligations about to fall due, that he will not have money, goods, or estate whereby he can discharge such obligations in full. Then being in any one of these conditions if he makes any disposition of his property, or any part of it, with intent, or the effect of which is to defeat, delay, or prejudice any one or more of his creditors, the disposition may be avoided

by the operation of the statute at the instance of creditors. In determining whether a debtor is insolvent or unable to pay his debts in full, or is on the eve of insolvency, his assets or effects are not to be estimated, in my judgment, at what they might bring at a forced sale under execution, but at their fair value in cash on the market at an ordinary sale, and I am of opinion that the assets of the debtor, in this case, at the time he made the assignment to the defendant McDonald so dealt with would not have realized the amount of his indebtedness. Therefore the assignment had the effect of giving his assignees, as creditors, a preference over other creditors, and it is in my opinion under the amended provision of the Act a matter of no consequence whether the assignor or assignees intended it to have that effect or not. It is sufficient if that is the effect of the assignment. To hold a man to be insolvent, judged by the value of his property at a sale under execution, would probably embarrass nine-tenths of those engaged in business, and avoid many of their transactions conducted with the utmost good faith and the greatest honesty of purpose in the ordinary course of business.

The object of the statute doubtless was to prevent debtors, without reasonable hope of continuing their business and paying their debts in full, making fraudulent assignments to the prejudice of their creditors generally, or to give to favoured creditors an advantage over less favoured ones.

The object was not to prevent a debtor, under all and every circumstance of embarrassment, making reasonable arrangements with a creditor who has a matured claim which, if enforced, would cause an immediate suspension of his business and sacrifice of his property. If acting in good faith, with assets fairly valued sufficient to meet his obligations in full he gets time from a creditor by giving security on part of his property, that security would not be void, though his circumstances afterwards became hopelessly worse, by reason of his not being insolvent at

the time he made the transfer of the property assigned to the creditor. An assignment of property in consideration of a present advance is by the express terms of the statute if made *bond fide* protected. By such an advance a new debt is contracted and the liability of the debtor is left undiminished, though he apply the moneys advanced in liquidation of some part of his indebtedness. So when a creditor, with a presently due obligation, gives, say a year's time to pay it on receiving security, he virtually lends the amount of the debt for a year, and as far as the effect on the debtor's estate is concerned, it is the same as if in good faith he had borrowed the money from a stranger and paid with the money a debt due by the debtor.

I incline therefore to the opinion that I have expressed, that an assignment of property as security for a debt honestly made as a simple business transaction, when a debtor has assets fairly valued sufficient to meet his entire obligations, is not invalidated by the statute because such debtor afterwards fails to meet his obligations, and his assets valued at their cash value at a forced sale were not at the time of the assignment sufficient to pay all the debtor's indebtedness. And I do not think in estimating the value of the property at the time of the assignment any allowance should be made to diminish such value on account of the inchoate right of dower of his wife in his real estate. It seems to me, it would be against the public interest and contrary to public policy, to lay it down that the moment a man becomes embarrassed he must go under and make an assignment for the general benefit of his creditors, without making an effort by pledging a portion of his property to obtain the indulgence of a creditor who is in a position to take immediate proceedings for the enforcement of a matured claim, which enforcement may seriously imperil the chance of creditors in respect of immatured claims being paid unless the debtor immediately makes an assignment for the benefit of all his creditors. It is in the public interest that all men should succeed in business rather than

fail, and a man with a going business temporarily embarrassed is more likely to succeed by continuing that going business, than by going under and starting life afresh without capital or good will of a business to assist him.

I am aware it may be urged that creditors will be indulgent to the only temporarily embarrassed debtor, but this depends entirely upon the disposition of the creditors, and is not a factor that may be relied on with certainty; and I think it more reasonable to so interpret the statute doing no violence to, but giving fair and full effect to its language and manifest intendment as to enable a debtor temporarily embarrassed, to continue his business by using a portion of his property to satisfy a pressing claim either by payment or by securing it, than to force him to make an assignment; provided that his assets at their fair value in the market without regard to what they would bring at a forced sale would be sufficient to meet his obligations.

In the present case, on the evidence, I am of opinion the assignor was insolvent, and by the impeached assignment the assignees obtained a preference over other creditors, and therefore I agree that the verdict for the defendants should be set aside and judgment entered for the plaintiff, declaring the assignment to be void as against the plaintiff and other creditors, with costs.

GALT, J., concurred.

[COMMON PLEAS DIVISION.]

WELSH ET UX. V. THE CORPORATION OF THE CITY OF
ST. CATHARINES.

*Municipal corporations—Connecting private drain with public drain—
Authority of corporation—Damages—Liability.*

The plaintiffs owned and occupied a house and premises which had been drained by a drain running through private grounds to and under a raceway, which the owners of the lands on the other side thereof on which the water flowed had stopped up. On the east side of the street on which plaintiffs' house was, there was an open ditch or drain connecting with the raceway, which at first was no higher than the street, but being afterwards banked up, the flow of the water was stopped and was spread over the adjoining lands. R., the then owner of plaintiffs' land, and others interested, petitioned the council to construct a drain under the raceway, which the corporation did by means of a well at the raceway and a five-inch pipe under it. R. then connected his private drain with the well. The defendants afterwards connected the drainage of other streets with the well, whereby more water was brought down to the well than the five-inch pipe would carry off, and it flowed back on to the plaintiffs' premises which were damaged. There was no authority given from the defendants to use the well, and the only evidence of acquiescence was the knowledge by O., defendants' street inspector, and no objection made by him.

Held, following *McConky v. Corporation of Brockville*, 11 O. R. 322, the defendants were not liable for the damage sustained by the plaintiffs.

THE plaintiffs statement of claim alleged that they were the owners and occupants of a dwelling house and premises on Phelps street in the city of St. Catharines, and of certain household furniture, goods, and chattels therein: that in or about the year 1880, the defendants constructed an open ditch or sewer on the easterly side of Phelps street, running under a raceway which crossed said street, for the purposes of draining the plaintiffs' premises and the premises of others situate on and near the said street: that the then owners of the plaintiffs' premises, with the knowledge and consent of the defendants, for the purpose of draining the cellars of their houses on said premises, constructed a box drain through their premises to said ditch or sewer constructed by the defendants, and also drains from the cellars of their respective houses connecting with the last mentioned drain (This should be connecting with said box

drain) in order that the water, which should flow into their said cellars, might be carried away and discharged into the defendants' said sewer; and the said drain, emptying into said sewer, has ever since been (until stopped up by the defendants) used by the owners of the said premises for the purpose for which it was constructed: that at the time the defendants constructed their said sewer and when the said box drain was connected therewith the portion which passed under the raceway was sufficiently large to carry away the water which flowed through the said sewer; but subsequently, in or about the year 1883, after the plaintiffs became owners of the said premises, the defendants negligently and improperly connected a large sewer, situate on Geneva street, which drained a large area of the city, with a sewer on Division street, and caused the water brought down the Geneva street sewer to be carried down Division street to the said sewer on Phelps street past the plaintiffs premises; and the water so brought down was greater than the sewer under the raceway was capable of carrying and discharging as the defendants well knew. In consequence whereof the water accumulated in a large quantity in the spring and fall and during heavy rains in the said Phelps street sewer north of the raceway, and backed up through the plaintiffs' said drain into their cellar, seriously damaged the plaintiffs house, household furniture and other chattels therein, and seriously injured the health of the plaintiffs and their family.

The statement of claim further alleged that recently, and for the purpose of deterring the plaintiffs from prosecuting their just claims, the defendants wrongfully and vindictively closed up the mouth or opening of the plaintiffs' drain in the defendants' sewer, and the plaintiffs have no means of draining their said premises; and the defendants thereafter intend to prevent the plaintiffs from re-opening said drain, and will, unless prevented by the order of the Court, continue to stop up the plaintiffs' drain. And they claimed damages \$500, their costs, and an injunction to prevent the defendants, their servants and workmen, from

stopping up the plaintiffs' said drain, or hindering the flow of water therefrom into their said sewer, and from hindering the plaintiffs from re-opening their said drain.

The defendants in their statement of defence alleged, among other matters not necessary to be stated, that the drain constructed by the plaintiffs or their predecessor in title from their premises to connect with the public drain of the defendants on Phelps street, was made wholly without the knowledge or consent of the defendants; and, if any damage occurred to the plaintiffs as alleged in their statement of claim, the defendants are in no way responsible for the same. And, by way of counter-claim, claimed the right to cut off the said private drain from the said public drain or sewer; and prayed that the plaintiffs might, by the order of the Court, be directed to cease from further attempting to interfere with the said public drain or sewer.

The cause was tried before Wilson, C. J., and a jury, at St. Catharines, at the Fall Assizes of 1886.

The learned Chief Justice left certain questions to the jury, and their findings in respect thereof were: 1. The defendants' sewer, after the water was brought from Geneva street in or about 1883, brought more water down Phelps street than had formerly come down that street. 2. The sewer was not sufficient to carry off the water that came down Phelps street after that. 3. The purpose for which the sewer was made was both to drain the cellars of the people on the east side of Phelps street and the surface water from Phelps street. 4. We are of opinion the council did not know of or consent to the plaintiffs draining their cellars into the city drain at the time they made connection with the city drain. 5 and 6. Reilly, an officer of the council, knew of it afterwards in 1883. 7. The municipality afterwards assented to and acquiesced in the plaintiffs so draining their cellar. 8. The cause of the plaintiffs' damage was the backing up of water in the private drain, caused by the insufficiency of the public drain. 9. The plaintiffs were not to blame in producing the injury. 10. We find damages for the plaintiffs at \$175.00.

On these findings, the learned Chief Justice directed judgment to be entered for the plaintiffs.

In Easter sittings, May 20, 1886, *Moss*, Q. C., obtained an order *nisi* calling on the plaintiffs to shew cause why this judgment should not be set aside and judgment entered for the defendants, upon the grounds, that upon the findings of the jury and the law the defendants were entitled to judgment in their favor; or why the findings of the jury upon the first, second, third, fifth, seventh, eighth, and ninth questions should not be set aside and a nonsuit or judgment entered for the defendants, on the ground that there was no evidence, or not sufficient evidence, to sustain the findings and judgment for the plaintiffs.

The defendants also gave notice of motion to the same effect.

During Michaelmas sittings, November 23rd, *Moss*, Q. C., and *MacDonald* (of St Catharines), supported the motion, and referred to *McConkey v. Corporation of Brockville*, 11 O. R. 322; *Scroggie v. Corporation of Guelph*, 36 U. C. R. 534; *Dillon on Municipal Corporations*, 2nd ed., sec. 801; 801; *Mills v. City of Brooklyn*, 37 N. Y. 489.

Lash, Q. C., and *R. G. Cox* referred to *McArthur v. Corporation of Collingwood*, 9 O. R. 368; *Coghlan v. Corporation of Ottawa*, 1 A. R. 54; *Holmes v. North Eastern R. W. Co.*, L. R. 4 Ex. 254, 6 Ex. 123.

December 24, 1886. CAMERON, C. J.—The plaintiffs did not move against the fourth finding of the jury, that the defendants did not know of or consent to the plaintiffs' draining their cellar into the city drain at the time they made connection with the city drain.

The evidence shewed that the house of the plaintiffs and four others on Phelps street, previous to the year 1880, had been drained by means of a drain running within the private premises down to the raceway under which it passed, pouring the water on property that became the property of the gas company, who stopped up this drain.

At this time there was an open ditch or drain on the east side of Phelps street, within the street, which took water down the street into the race, which at first was not higher than the street, and presented no obstruction to the flow of water. This raceway was afterwards banked up and the water brought down Phelps street and from the plaintiffs' premises, was stopped by this embankment, and spread over the land adjoining the street. In consequence a number of persons interested, including the former owner of the plaintiff's premises, John Rason, by petition, dated on the 29th January, 1880, petitioned the council as follows:

"We, the undersigned, residents on Phelps street, between Division street and Mill race, respectfully shew, that the premises which we occupy are inundated by water flowing from Division street and mill race. We respectfully ask your honorable body to construct a drain under the mill race for the purpose of carrying off the water from our respective premises."

The corporation in compliance with this petition caused a well or perpendicular shaft to be sunk at the end of the open drain on Phelps street to a sufficient depth to put a pipe connecting therewith under the mill race, the connecting pipe being five inches in diameter. Rason, after this was done, connected the box drain on his premises with the street drain by extending it to the said well which it entered somewhere about a foot below the surface of the ground, this being the connection that the jury found was made without the knowledge or consent of the council by their fourth finding, and which they found was afterwards known to John Reilly who was the defendants street superintendant, and acquiesced in by the council. The only evidence of acquiescence was Reilly's knowledge of the existence of the connection, and no objection made to it by him or other person on behalf of the council. Afterwards, in the year 1883, the corporation laid a six inch pipe across Geneva street, which took the water that used to flow along the west side of Geneva street on to Division street,

and thence along Division eastward to Phelps street, and thence along the open ditch or drain on the east side of Phelps street to the above mentioned well, and thence by the five inch pipe under the mill race. It was the bringing of this water from Geneva street that the plaintiffs complained of. There was abundance of evidence, if believed, though it was contradicted on behalf of the defendants, to warrant the finding of the jury that a greater quantity of water was brought on to Phelps street by means of the pipe across Geneva street, than before that pipe was laid, flowed there; and, if that was the only question involved, the findings of the jury could not properly be disturbed by the Court. Since then a ten inch pipe has been put in the place of the five inch pipe under the mill-race, and there is no difficulty experienced by the stoppage of water there now.

There was scientific evidence given on behalf of the defendants to establish that by reason of the angle at which the five inch pipe was laid the velocity of the flow of the water in it was so much greater than the velocity of the water coming to it that it was sufficient to carry off the water brought there although in greater volume. There was, as against this theory, the fact that in heavy rains and freshets, spring and fall, the water was not carried off rapidly enough and was backed up the private drain into the cellars of the houses. The small pipe was, on two occasions, found to be stopped up. This may have been the sole cause of the back flow, and it may be the scientific evidence was correct. But the jury are the judges of the weight to be attached to scientific evidence as well as all other evidence, and the Court cannot say on this evidence they arrived at a conclusion the whole of the evidence taken together did not support, nor that this conclusion is one that reasonable men ought not to have reached. This being so it is the duty of the Court not to interfere. The case, however, is not distinguishable from that of *McConkey v. Corporation of Brockville*, 11 O. R. 322, recently decided in this Division of the High Court, unless

the acquiescence of the defendants in the use of the street drain made by the plaintiffs by connecting the private drain therewith, found by the jury, is a matter by which it is distinguishable on principle, and a liability thereby created.

Mr. *Dillon* in his work on Municipal Corporations, supported by the American authorities referred to by him, lays down the law as follows, at section 801 of the 2nd edition :

"Since the duty of providing drainage or sewerage for surface water is in its nature judicial or *quasi* judicial, requiring the exercise of judgment as to the time when, or the mode in which, it shall be undertaken, the claims of respective localities as to the order of commencement when it cannot all be effected at once, and the best plan which the means at the disposal of the corporation render it practicable to adopt, it follows, upon legal principles, that the corporation is not liable to a civil action for wholly failing to provide drainage or sewerage, nor, probably, for any defect or want of efficiency in the plan of sewerage or drainage adopted; nor, according to the prevailing and perhaps correct view, for the insufficient size or want of capacity of gutters or sewers for the purpose intended, particularly if the adjoining property is not in any worse position than if no gutters or sewers whatever had been constructed."

It cannot now be held in this country that the rule stated thus broadly prevails; for it is well established where a corporation brings water to a point it would not have reached but for the act of the corporation, and it is at that point turned upon the land of a private individual, or backed into his cellar, this is an actionable wrong: *Coghlán v. City of Ottawa*, 1 A. R. 54, and many other authorities.

The construction of drains and sewers, their location, capacity, &c., this writer regards as judicial. After their construction, keeping them in repair and free from obstruction is a ministerial duty; and, for neglecting the discharge

of such ministerial duty resulting in injury to an individual or his property, an action will lie.

I am of opinion the principles to be evolved from authority applicable to this case would make the defendants liable, if they had required the plaintiffs or their predecessors in title to the land affected, to make use of the drain in question ; but that the mere permissive user does not make it obligatory upon the corporation to protect the plaintiffs from injury resulting from such user and which would not have happened without.

In this case the evidence clearly establishes that the water was backed up the private drain into the cellar, and that none was forced out of the drain over the surface of the ground into the cellar : that the private drain entered the well or shaft at a point below the bottom of the street drain carrying the surface water to the well ; and so the injury resulted to the plaintiffs from the unauthorized use of the street drain by them for their own convenience, and that the acquiescence in such user found by the jury did not entail upon the defendants any greater liability than would have rested upon them if they had been unaware of such user, as the user cast no additional duty or obligation upon the defendants in respect to the way in which they should use the drain. The bringing of the larger quantity of water from Geneva street to Phelps street was a lawful act in itself and would not have resulted in injury to the plaintiffs had their private drain not been connected with the street drain.

There was no evidence that warranted the jury in finding that the well was constructed, and the five inch pipe laid under the mill race, for the purpose of draining the cellars of the adjacent lands. It could not have that effect without the private drain being connected therewith, while it would answer the purpose of removing the surface water collected on Phelps street and the adjoining premises, by reason of the obstruction to the flowing away of the water caused by the embankment of the mill race. The legality of this race and embankment was not ques-

tioned; and, though it crossed a highway, the Court is not in a position to say it was there illegally, if that would have made any difference in the rights of the parties.

It is fitting that I should refer to the by-laws respecting sewers and drains put in evidence.

The first of these was by-law 331, passed on 27th December, 1880. It is entitled, "A by-law relating to sewers in the city of St. Catharines and the government of the same." It provided in clause 1, that all connection with the Welland avenue and other sewers be under the direction and supervision of the board of works: (2) that all work be executed by a proper mechanic appointed by the board for that purpose: (3) that the board keep a supply of suitable material for making such connections: that the connections be made of similar materials to that used in main pipes, and to the extent and in the manner shewn in drawings therewith: (4) that when the cost of executing the work, in addition to cost of material, has been paid by applicant, a permit be given to the proper authority to proceed with the work: (6) that all parties who have made connection with any of the sewers already constructed or such sewers, or extensions of the same, as may hereafter be constructed, be prohibited from using said sewers as an outlet for waterclosets or cesspools.

This by-law was passed after the well and pipe therefrom under the raceway were constructed; and, though no great stress was placed upon it in the argument, the sixth clause would seem to recognize the right of parties who had made connections with such sewers to continue the same. But, in my judgment, the by-law does not affect the legal rights of the parties to this litigation. From the character and requirements of the by-law it was not intended to apply to open or surface drains such as the drain on Phelps street.

The language of Merrick, J., in *Barry v. City of Lowell*, 8 Allen 127, which I adopt, is pertinent to the rights of the parties on the facts in this case. It is as follows: "The damage for which the plaintiff seeks in this action to recover compensation was caused by the over-

flow on to his land and into the cellar of his dwelling house, in consequence of the inattention and negligence of the defendants in keeping open and in proper repair one of their main drains and common sewers, of the surface water collected on one of the highways in the city. It is a general rule that no action lies at Common Law against a town for an injury sustained through any defect in a highway * * And no remedy is given by any statute for such an injury as is described in the declaration. But the plaintiff relies upon the decision of *Child v. Boston*, 4 Allen 41, in which it was held that the defendants, upon the facts disclosed in that case, were liable to the plaintiff for the damage occasioned by surplus water forced back upon the plaintiff's land, by suffering their common sewer to be stopped up and obstructed so that no water could pass through or be discharged from the same. The reason why they were held liable in that case is, that the city ordinance requires all the particular drains from private estates to be entered into the main and common drains of the city, and to be laid and constructed under the direction of the board of aldermen. The owner of a private estate has therefore in such case no means of protecting it against the accumulation of water by the fall of rain or the melting of snow, if the city suffers its common sewer to be out of repair, or negligently stopped up and obstructed. As the city assumes to regulate the whole subject, and compels all individuals to conform to and comply with their ordinances, it results by necessary implication that they make themselves liable for whatever mischief or injury necessarily results from any negligence or omission of duty on their part. But in the present case the defendants never by any act or ordinance required the plaintiff to drain the water from his land or to make his private or particular drain open into the common sewer, but left him to manage his estate as he should think most for his own interest or advantage." The learned Judge may have been under the impression that if, as in this case, the plaintiff's drain had been connected with the street drain there would have

been a liability ; for he adds, but without stating what the effect of the connection would be when not required : “ He never connected or sought to connect any drain from his land with the common sewer of the city ; and in fact he could not have effectually done so without alteration of the estate, for it appears that his cellar was below the lowest part of the common sewer. Since the plaintiff was not required to conform his drainage to that which the city had provided for public purposes, and had in fact never made use in that way of the common sewer which they had constructed, he had a right to prevent the overflow of water from it on to his own land by erecting such obstruction there as was necessary for that purpose. But if he omitted to do so and sustained damage in consequence of the failure of the defendants to keep their own works in good order or in due repair, he can maintain no action therefor because none is provided by statute, and because by the use of lawful means he might himself have prevented the injury.”

As already stated under the circumstances of the present case the fact that the private drain had been connected with the street drain in my opinion makes no difference in the respective rights of the parties ; and I would qualify what was said by Merrick, J., in the language just quoted, to this extent ; that had the connection of the drains been made by the positive requirements of a by-law of the corporation, the mere fact of an obstruction of the common sewer and a consequent overflow would not *per se* amount to evidence of actionable negligence on the part of the defendants.

I adhere to the opinion expressed by me in *Noble v. Corporation of Toronto*, 46 U. C. R. 519, at pp. 542-3, on this point, and refer also to the language of Brett, J., in *Hammond v. Vestry of St. Pancras*, L. R. 9 C. P. 316, 322.

To make a corporation liable for injury from the overflow of a drain I think it must be shewn affirmatively that the corporation required the property owners to use the public drain by connecting the private drains therewith.

secondly, that the drain or sewer has been improperly and negligently constructed and injury results in consequence of such negligent and improper construction, or that the same has become obstructed and the corporation has negligently omitted to remove the obstruction within a reasonable time after knowledge or notice of the obstruction, and injury results to the plaintiff after such reasonable time for removal after such knowledge or notice has been had by the corporation; or, third, the corporation brings to the plaintiff's land by means of the drain or sewer more water than would otherwise come to the same, and pours it wilfully upon the said land, or after bringing the water to the land negligently allows it to escape and flow over the land.

There is no doubt the plaintiffs suffered very considerable injury from the flowing back of the water into the cellar, and the damages are by no means excessive if the plaintiffs were entitled to recover anything. But for the reasons I have advanced I think they are not liable for anything, and judgment should be entered for the defendants, dismissing the plaintiffs' action, with costs, and the defendants, if they desire it, are entitled to an injunction to restrain the plaintiffs from further using the said Phelps street drain by pouring water therein from their box drain without the license of the defendants.

ROSE, J.—I desire to rest my concurrence in the result arrived at by the learned Chief Justice and my brother Galt, on the following grounds:

(1). That the defendant corporation when they constructed the well with which subsequently the plaintiffs connected their drain, had the right to use that well to its fullest capacity, and that the plaintiffs could not, by using the well as the emptying place of their drain without any agreement with the defendants, deprive the defendants of such right.

(2). That the plaintiffs, when they connected their drain, inserting it below the surface, took upon themselves the risk of the water rising higher than the mouth of their drain, and

could not call upon the corporation to refrain from pouring water into the well because possibly some of it would escape through their drain on their property.

(3). That it was the plaintiffs' duty when they made the connection to provide a flap or other contrivance to prevent water flowing back into and through their drain on their property ; and that they were not in a position, even if permitted to use the well, to call upon the corporation to protect them against their own carelessness.

Corporations are sufficiently burdened by necessary regulations and rules of law laid down for the protection of the public ; and it would be an improper addition to such burden to hold that they were bound to examine every connection with their drains made without their consent in order to ascertain the mode of such connection, so as to prevent injury to the property of the person thus using the corporation drains by reason of unskilful work in making the connection.

This action is an attempt to prove not only knowledge on the part of the corporation of the fact but also of the manner of the connection and assent thereto, and to establish a duty on the part of the corporation to refrain from the full and free use of its own drain lest perchance some water might escape therefrom on the plaintiffs' property.

I agree the action must be dismissed.

GALT, J., concurred.

Judgment for defendants.

[COMMON PLEAS DIVISION.]

CITIZENS INSURANCE COMPANY V. CLUXTON.

Principal and surety—Change in position of principal debtor—Release of sureties—Renunciation clause—Sureties undertaking to be liable as principals—Joint contractors.

Where an alteration is made in the contract of suretyship, then, unless it is without enquiry self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not go into an enquiry or permit the question to be submitted to the jury, but will hold that the surety must be the sole judge as to whether he will remain liable, notwithstanding the alteration.

A bond made by defendants as sureties, and B. as principal, to the plaintiffs, to secure the faithful and diligent performance of B.'s duties, including the payment over of moneys, recited that B. had been appointed agent for the plaintiffs for the Province of Ontario, and as such was to discharge certain duties, and to receive certain moneys, as defined in the instrument appointing him, and as to which the parties thereby declared they had due and sufficient communication. The condition of the bond was for the performance of such duties, and the payment over of such moneys. The bond also contained the following clause: "The said sureties, in consideration of the premises, hereby agree to * * renounce to (*sic*) the benefits of division, discussion and all other benefits of sureties, consenting to be bound as fully in all respects as the said principal party." The instrument of appointment provided that B. should be general agent for the province, should have control over all local agents, except some six, including those of Hamilton and Galt, and his compensation should be a commission of 35 per cent. on all business obtained by himself or the said agents under his control, he to pay the agents thereout, and on renewals 30 per cent.; and also to have a salary of \$75 a month, which was to include travelling expenses. The plaintiffs afterwards added Hamilton and Galt to his agencies. Subsequently B.'s business was confined to Toronto, and he agreed to relinquish his commission on the outside agencies; and it was intimated to him that at the close of the year his salary would have to be rearranged.

Held, that the taking away of the outside agencies was such a change in B.'s position as could not be said to be without enquiry, evidently unsubstantial and not prejudicial to the sureties, and would of itself discharge them; but as to Galt and Hamilton it could not be said, on the evidence, to have that effect.

Held, also, that the effect of the renunciation clause was to place the principal and sureties in the position of joint contractors: that the agreement confining B.'s business to Toronto amounted to a new contract; and that the sureties would be only liable as principals for default up to the date thereof, and not thereafter.

THIS was an action tried before Galt, J., without a jury at Toronto, at the Fall Assizes of 1885.

The action was brought against the defendants Cluxton and Case as sureties, and Boughton as principal, on a bond

given to the plaintiffs to secure the faithful and diligent performance of the principal's duties to the plaintiffs, including paying over of moneys in respect to which there was, as alleged, default.

The bond recited the agreement between the plaintiffs and Boughton as follows :

" Whereas the said Claudius V. Boughton has been appointed agent for the said Citizens' Insurance Company of Canada, to act as such agent in and for the said Province of Ontario, to discharge certain duties and to receive certain moneys as such agent for and on behalf of the said Citizen's Insurance Company of Canada, according to the definition of his duties contained in the instrument appointing him, dated the 19th day of October, 1883, of which the parties hereto declare to have had due and sufficient communication."

The condition was for the performance of "the said duties:"

"His duties as agent of the said company," and payment over of moneys "for which he shall be responsible as such agent."

The bond also contained the following clause :

"And the said sureties, in consideration of the premises; hereby agree to waive any notice of any default the said Claudius V. Boughton may at any time make in his duties as such agent, and to renounce to (sic) the benefits of division, discussion, and all other benefits of sureties, consenting to be bound as fully in all respects as the said principal party."

The agreement thus in part recited, and as to the contents of which each party declared himself to have had due and sufficient communication, provided that the agent should be general agent for the Province, should have control over all local agents, excepting, however, from the agency the cities of Hamilton, Kingston, St. Catharines, Peterborough, Galt, Chatham, and two special agencies: that the compensation should be a commission of 35 per cent. upon all new business obtained by himself or the agents under his control—he to pay his agents out of the 35 per cent. and a salary, which was to include travelling and other expenses, of \$75 per month. On renewal business a commission of 30 per cent on amounts remitted to the company by him or his agents.

The defences set up were that subsequently to the entering into this bond the plaintiffs added to the agency the city of Hamilton and the town of Galt, and later on varied the agreement both as to duties and remuneration, whereby the sureties claimed to have been discharged.

The statement of claim was delivered on the 2nd of April, 1885, and amended on the 22nd of the same month.

By the amendment clause 1 a. was added, which was as follows :

"Subsequently to the said agreement of the 19th October, 1883, the defendant Boughton, being unable to devote proper attention to the sub-agencies not excepted from the said agreement, relinquished all claim to commission under the said agreement from business taken at the said sub-agencies, and agreed to confine his exertions to the city of Toronto, upon the terms set out in the said agreement of the 19th of October, 1883."

The letters evidencing the arrangement referred to, were those of the 18th and 31st July, 1884—the former to and the latter from the plaintiffs.

In the former the agent after repudiating the charge made in a letter to him of the 16th, that he had made no effort to promote the business outside of the city of Toronto, added :

"As to the outside commissions, I wrote to you months ago that I did not expect any commission from the agents outside. I thought it was fully understood, although you never replied to my letter in any way."

The reply of the 31st, was as follows :

"I note by your letter of the 18th inst. that you relinquish right to commissions on outside agency business. We have no letter from you previously on the subject that we are aware of, and it is a pity as we have missed making several appointments and spreading our business under the apprehension that it would interfere with your rights. There yet remains the salary allowance to be disposed of, which was only given to promote agency business. I suppose now as we are so near the twelve months' termination of your contract, we will leave it over till then and see how the results pan out. I am afraid it will be a loss in this year's operations."

This letter was signed by the general manager of the plaintiffs, one Gerald E. Hart, who in his evidence put his construction on the correspondence.

"Q. It was arranged at that time that the outside agencies should be relinquished? A. Yes.

* * * * *

"Q. What did you do in consequence of the relinquishment under your arrangement? A. The fact is, that as he had done nothing with the outside agencies, we took the matter in hand."

The learned Judge entered judgment for the plaintiffs.

In Michaelmas Sittings, 1885, *George Macdonald* moved on notice to set aside the judgment for the plaintiffs and enter judgment for the defendants.

During Hilary Sittings, February 10, 1886, *Moss, Q. C. and G. Macdonald*. supported the motion. The liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or it may be even for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. The reason is, that the surety never made the contract upon which it is sought to charge him. The surety must be consulted as to any proposed alteration which is needed; and, if he is not, or being consulted, does not consent to the alteration, he will be no longer bound; and the Court will not inquire whether it be or not for his benefit. The taking away the outside agencies, and thus depriving the agent of the commission he would get therefrom, was a substantial alteration which discharged the sureties. The adding of Galt and Hamilton was such an alteration in the contract as also discharged the sureties: *Baylies on Sureties*, 260, 269; *Bonar v. Macdonald*, 3 H. L. Cas. 226; *North Western R. W. Co. v. Whinray*, 10 Ex. 77; *Canada Agricultural Ins Co. v. Watt*, 30 C. P. 351; *Skillett v.*

Fletcher, L. R. 2 C. P. 469; *Miller v. Stewart*, 9 Wheaton 680, 702; *United States v. O'Neill*, 19 Fed. R. 567, 570; *Titus v. Durkee*, 12 C. P. 367; *Holme v. Brunskill*, 3 Q. B. D. 495; *Corporation of Gananoque v. Stunden*, 1 O. R. 1; *DeColyar* on Guarantees, 2nd ed., 380, 385-8, 395-7.

Robinson, Q. C., contra. There is no dispute as to the law. The question is, as to the application of the facts. There is no evidence to shew any change in the contract. As to Galt and Hamilton, Boughton never assumed control of them. Then as to cutting off the outside agencies. There is no new contract made as to these agencies; but as Boughton neglected his duties in respect to them, the company called attention to his neglect and restricted his business to Toronto. There is no case which shews that where the scope of the employment is lessened through the neglect of the principal the surety is discharged. The clause in the bond of suretyship, whereby the sureties renounce all the benefits of suretyship, and agree to be bound as principals, prevents the sureties setting up that they are discharged, for they are placed in the same position as the principal. He referred to *Home Savings Bank v. Traub*, 42 Amer. 402, 404, note; *Strawbridge v. Baltimore and Ohio R. W. Co.*, 14 Maryland 360; *Corporation of Beverley v Barlow*, 10 C.P. 178; *Bank of Toronto v. Wi'mot*, 19 U. C. R. 73; *Brandt* on Suretyship, sec. 342, *et seq.*; *De Colyar* on Guarantees, 2nd ed., 211, 214-6; *Frank v. Edwards*, 8 Ex. 214.

Moss, Q. C., in reply. Under the Civil law a surety could not be proceeded against until after suit brought against the principal; and the effect of the clause is to dispense with the provision of the civil law, and to allow the sureties to be sued along with the principal; *Story's Conflict of Laws*, 8th ed. p. 432, sec. 322, b. The provision of the agreement, that in case of neglect, the principal's services are not dispensed with except on sixty days notice, shews that no such alteration as was made was ever contemplated: *Mumford v. Memphis and Charleston R. W. Co.*, 31 Amer. R. 616.

A re-argument of the case was directed on the point as to the effect of the renunciation clause as making the sureties principals.

In Easter Sittings, June 4, 1886, the re-argument took place.

Moss, Q. C., and *Drayton*, supported the motion. The renunciation clause does not do away with the position of principal and sureties, but merely, as pointed out in the previous argument, dispenses with the provision of the civil law as to when the action against the sureties can be brought: *Lower Canada Civil Code*, Art. 1941. It is also open to question whether the doctrine of novation does not arise, and by the effect of a new contract, a new creditor is substituted for a former one towards whom the debtor is discharged. Novation, by the substitution of a new debtor, may be effected without the concurrence of the former one: *Civil Code*, Art. 1169, 1172. Even if the clause made the sureties principals, they would not be liable on the new contract.

Robinson, Q. C., contra. There is no question that the effect of the clause is to make the sureties principals. They are clearly liable for any default before the change was made, and there is nothing to prevent their being liable afterwards. This is not a new contract but the old contract with a variation. The principal and sureties are in the position of joint contractors. There is implied authority from one joint contractor to another to make such a change as was made here. He referred to *The Corporation of Adjala v. McElroy*, 9 O. R. 580; *Austin v. Gibson*, 28 C. P. 554, 4 A. R. 316.

Moss, Q. C., in reply, referred to *DeColyar on Guarantees*, 2nd ed., p. 246; *Bailey v. Griffith*, 40 U. C. R. 418; *Taylor v. Hilary*, 1 C. M. & R. 741, 743.

December 24, 1886. *Rose, J.*—As has been said in many cases the principles of law governing contracts of suretyship are clear, the difficulty lies in the application.

The rule as found in *Bonar v. Macdonald*, 3 H. L. Cas. 226. at p. 238, and extracted from the English authorities there named by Lord Cottenham, is "that any variance in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety;" and he adds: "As to Scotland, in *Bell's Principles*, p. 71 the rule is laid down that the 'cautioner is freed by any essential change, consented to by the creditor on the principal obligation or transaction, or without the knowledge or assent of the cautioner.'"

In *Bonar v. Macdonald* the sureties were held freed by reason of certain duties having been added to the office of the principal debtor. The decision turned on the form of the bond or agreement of suretyship, and is discussed in argument in the case of *Skillett v. Fletcher*, L. R. 2 C. P. 469.

Mr. Robinson relied on *Frank v. Edwards*, 8 Ex. p. 214, as affording authority in answer to this defence.

There one Roberts was appointed assistant overseer of the poor of the parish of West Felton in 1841. On the 27th of April, 1846, at a vestry meeting, he was continued in office and certain securities were required. The words of the resolution were: "That Mr. T. Roberts continue the office of assistant overseer, giving security for the due performance of his duties." On the 28th of May following a vestry meeting was again held; and it was there resolved: "That Mr. T. Roberts, the assistant overseer, continue his office as usual, and that he give securities," &c. He had been performing the duties for the annual salary of £16. This meeting was on the 28th of May. On the 11th of June, 1846, the bond was given. It recited the nomination and election, and was conditioned "that, if the above bounden Thomas Roberts shall from time to time, and at all times hereafter during the continuance of his said appointment," &c., "well and faithfully collect," &c. and

execute "all such other duties (if any) as are contained in his warrant of appointment," &c.

The warrant of appointment was dated the 25th of June, 1846, and recited his appointment by the vestry, and that the vestry "did fix the yearly sum of £16 as and for the yearly salary," &c. These words must, it seems to me, refer to the words "continue in his office as usual," found in the resolution. If so, the salary was fixed prior to the making of the bond, and the recital of his nomination in the bond was possibly a recital of his appointment at that salary.

This, however, does not seem to have been the construction put upon it in the later case of *North Western R. W. Co. v. Whinray*, to which I will refer.

In 1851, the duties having in the meantime been lessened by Act of Parliament, the salary was reduced to £14. The following resolution was entered in the parish books: "At a vestry meeting of the inhabitants of the parish of West Felton, in the county of Salop, held the 6th of March, 1851, pursuant to proper notice given thereof, it was agreed upon by us, the undersigned, that Mr. Thomas Roberts, assistant overseer, continue the assistant overseer's office at the salary of £14 per annum from year to year, unless he receives proper notice from the inhabitants of West Felton, to commence from Lady Day, 1851." This was signed by Abraham Hancox, one of the sureties, and several others. Default having been made, judgment in an action against the sureties was given for the plaintiffs; and a question was raised for the opinion of the Court, whether the change made by the vestry in March, 1851, did or did not create a different office to that for the due discharge of which the sureties had entered into the bond.

The Court, consisting of Barons Parke, Alderson, Platt, and Martin, at p. 220, held it did not; but that he continued in the old office at a reduced salary: that the sureties were liable; and, if they "had thought the salary was a necessary ingredient in the contract, they ought to have

taken care to have had a stipulation inserted in the condition of the bond, that they would be liable only so long as the overseer was continued at the same salary."

Although counsel in argument pressed the point as to the alteration in the duties which preceded the reduction in the salary, no reference is made to it in the judgment.

Parke, B., said: "The only question is, whether the reduction of the salary * * * can be considered as a revocation of the original appointment."

In *Holland v. Lea*, 9 Ex. 430, *Frank v. Edwards* was cited as an authority by Martin, B., the dissentient Judge. The other Judges make no reference to it, as, in their opinion, the justices had made no appointment pursuant to the statute when they appointed at a larger salary than that fixed by the vestry before the bond was given.

This case, it seems to me, makes it clear that the parties to the bond in the *Frank v. Edwards* case must be taken to have contracted with knowledge of the amount of salary fixed by the vestry before the bond was entered into.

In the *North-Western R. W. Co. v. Whinray*, 10 Ex. 77, the Court, composed of C. B. Pollock, and Barons, Alderson, Platt, and Martin, held that where the bond recited the appointment of one Latham as agent for the plaintiffs, "at a yearly salary of £100 per annum," the sureties undertook to be responsible only while continued at such salary, and therefore when the plaintiffs and Latham changed the mode of remuneration from a salary to commission the sureties were discharged.

During the argument counsel referred to *Holland v. Lea*, as overruling *Frank v. Edwards*; but Martin, B., observed in giving judgment, that the opinion he then expressed was quite consistent with his judgment in *Holland v. Lea*.

In *Holland v. Lea*, he was, as I have noted, the dissentient Judge, and relied on *Frank v. Edwards*.

It is difficult to see how in any way *Holland v. Lee* can be taken to have overruled *Frank v. Edwards*.

In the *North-Western R. W. Co. v. Whinray*, Platt, B., distinguished *Frank v. Edwards*, from the case before him,

on the ground that the bond contained the recital as to the salary being £100, which he said evidenced a bargain between the plaintiffs and the sureties that the agents should have that salary.

I may at once confess my inability to distinguish the cases on that ground.

As will be apparent from reading the two cases of *Frank v. Edwards*, and *Holland v. Lea*, the provisions of the statute required first that the overseer should be nominated and elected by the inhabitants in vestry; second, a bond to be given; third, an appointment by the justices, and that at the nomination and election the vestry were required to fix such yearly salary as they thought fit, and that the appointment by the justices should be at the salary fixed by the inhabitants in vestry.

When therefore the bond was given reciting or referring by recital to the election, it referred to the election at a fixed salary, and all parties being taken to know the provisions of the statute, it seems to me there is no substantial distinction between a bond referring by recital to an election at a fixed salary though the amount is not put in figures in the bond, and the recital referring to an appointment at a fixed salary with the amount named in figures in the bond. In each case there had been a previous fixing of the amount of remuneration to recompense the servant for his services, for the due performance of which the sureties became responsible.

It seems to me the true distinction between the cases is that in *Frank v. Edwards* it was thought that the risk of the sureties could not have been increased, while in *North-Western R. W. Co. v. Whinray* the risk was materially increased. Pollock, C. B., during the argument, and Alderson, B., in giving judgment, expressly took that position.

In *Holme v. Brunskill*, 3 Q. B. D. 495, at p. 507, may be found the rule or proposition of law laid down by Cotton and Thesiger, L. JJ., and on p. 508 by Brett, L. J., who dissented from the rest of the Court. I need not set them out at length. The majority of the Court in effect said,

that unless it was without enquiry self-evident that the alteration [was unsubstantial,] or one which could not be prejudicial to the surety, the Court would not go into an enquiry or permit the question to be submitted to a jury ; but would hold that the surety must be the sole judge as to whether he will remain liable notwithstanding the alteration. See also observations of Moss, C. J. O., in *Austin v. Gibson*, 4 A. R., at p. 321.

Brett, L. J., stated his opinion to be that, "If there is a material alteration of the relation in a contract, the observance of which is necessary ; and, if a man makes himself a surety by an instrument reciting the principal relation or contract in such specific terms as to make the observance of the specific terms the condition of his liability, then any alteration which happens is material ; but where the surety makes himself responsible in general terms for the observance of certain relations between parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract."

The case in 10 Ex. 77 was cited in argument, but the judgments make no reference to it or the cases above referred to in 8 Ex. 214, and 9 Ex. 430.

The learned Chief Justice of this Division when in the Queen's Bench Division, decided the case of the *Canada Agricultural Ins. Co. v. Watt*, reported in 30 C. P. 350, in which he reviews most of the authorities, and stated that if it had been necessary for him to decide the question whether the change in the remuneration of a principal by the substitution of a commission for a fixed salary would discharge the surety, he would have great difficulty in doing so, but that he inclined to the view that it would if the nature of the remuneration was communicated to him as it would be an alteration in the relation of the principals that might or might not be prejudicial to the surety and so involve enquiry.

Applying either the rule of the majority of the Court or that of Brett, L. J., in *Holme v. Brunskill*, can it be argued successfully that the cutting off the outside agencies, taking

away the chance of a commission for all the work outside of Toronto, with the probable result that the salary would be discontinued, was a change which was without enquiry, evidently unsubstantial, and which could not be prejudicial to the surety, or that the agreement as recited is not recited in such specific terms as to make the observance of the specific terms a condition of liability ?

In my opinion, the change was one which might diminish the income of Boughton and thus increase the risk of the sureties, and the recital was specific both as to duties and remuneration.

As to the alleged addition of Galt and Hamilton, I am of the opinion, on the evidence, that what was done as to them was, without enquiry, evidently unsubstantial. Boughton was asked to obtain an agent for the company at Hamilton and failed, and the old agent remained in possession of that agency.

As to Galt, on the 20th November, 1883, the plaintiff's general manager wrote to Boughton as follows : " Since appointing Mr. Jones our accident agent at Galt, we have received a number of letters from him somewhat similar to the enclosed, and some little business. I have written to him frequently and have done all I could to keep his head before the wind, and now have pleasure in turning him over to you."

Boughton, in his evidence at the trial, said as follows :

" Q. Now what reply did you make to that ? A. The reply to that letter was simply that I would look after it.

" Q. Do you know whether you did answer in fact or simply acted upon it. A. It is my impression I acted upon it. I believe I had some correspondence with the agent at Galt.

" Q. What did you do, or what do you think you had to do in connection with this letter ? A. I kept in communication with all the agents.

" Q. Who is Mr. Jones ? A. I had nothing to do with him.

" Q. After this letter, rightfully or wrongfully you did take charge of the Galt agency ? A. Certainly.

Q. In what way would he come under that charge ? A. In the way of advising me as to insurance.

Q. Was there in fact any business done by Mr. Jones after this ? A. I cannot say for I never could find out from the Head Office."

From such evidence it seems impossible to find any substantial alteration.

If the evidence had been of a different character, it would have become necessary to have carefully considered the effect of *Skillett v. Fletcher*, L. R. 2 C. P. 469, where it was held that the appointment of a principal to a new and distinct office did not discharge the sureties. See judgment of Blackburn, J., p. 474.

There yet remains to be considered the effect of the renunciation clause. The meaning of "division" and "discussion" may be found in *Story's Conflict of Laws*, 8th ed., sec. 322b.; and see also *Bonar v. Macdonald*, p. 227 note (a).

We were not referred to any decision as to the meaning or effect of such a clause as we have here, and I have not been able to discover any. Unaided by authority the best opinion I can form is, that the words must be taken with their ordinary meaning, and that the effect is that the sureties intended to renounce all benefits of sureties, and consented to be bound as fully in all respects as the principal. In other words the principal and sureties became in a sense joint contractors.

Assuming this to be so, then what would be the respective rights of the parties? A joint contractor certainly would not be bound by a new contract made by his co-contractor with the creditor without his knowledge and consent, unless it could be inferred that there was authority on the doctrine of implied agency. Nor, on the other hand, as it seems to me, would he be released by such efforts as were here made by the plaintiffs to engage the attention of Boughton to the Hamilton and Galt agencies, which certainly did not work to his prejudice.

The principal governing such cases may be, to use language found in another connection in *Bailey v. Griffith*, 40 U. C. R. 418, at p. 432, "that where a creditor has at the time of the contract notice of an equity existing between two persons with whom he is concerned, it is his duty so to deal with the parties as not to affect their equitable rights."

To illustrate by the case before us. I have come to the conclusion that the agreement entered into between the plaintiffs and Boughton, by which the outside agencies were taken away and the income lessened, might have increased the sureties' risk and so released them as sureties. If, however, it appears that not only did it not increase the risk, but as a matter of fact lessened it, and was a direct benefit to the sureties, then, if they were bound as fully in all respect as the principal party, would there be any release?

After the new arrangement, if binding upon the parties, and if it changed their position, could the plaintiffs recover against the sureties for any subsequent default? Would not the answer be, you are suing me for liability on a new contract to which I never became a party? And, if a claim is made on the sureties as principals for default previous to the new arrangement, would they not be entitled to shew that the new agreement prevented Boughton earning sufficient to pay off such liabilities as were created previous to making the new agreement, or possibly to call upon the plaintiffs to shew that the new arrangement did not work to their prejudice?

But looking at Boughton and his sureties as principals only, the clause in the agreement, which provided that if Boughton did not devote proper care and attention to the objects of the agreement the same should be terminable upon sixty days' notice, requires consideration.

Could the plaintiffs, by agreement with one of the principals, consent that he might neglect part of his duty and give up a portion of his income? Would that not be in effect a new agreement? If so, must they not, if they wish to put an end to the old agreement, give the sixty days' notice and then enter into such new arrangement as they might desire? Could the plaintiffs answer thus? "You, the principals, left the work to be performed by one of yourselves. He neglected his duties; and, instead of putting an end to the contract upon notice, we relieved him of the neglected duties and deprived him of the

income, which was given as a reward for attending to them, and continued him in his office to discharge his remaining duties with the residue of his income." Would not the reply to this be, that the contract provided a mode of determination for neglect of duty, and, unless that was adopted, it remained in full force?

Then, may not the result be as follows: As sureties, the defendants, Cluxton and Case, are released; as principals, they are released if what was done was effectual and was to their detriment, or that if what was done was not effectual, they are liable to answer for the default shewn on the footing of an account, crediting Boughton with all the commissions to which he would have been entitled if the attempted arrangement had not been made?

The effect of treating the parties as principals was not fully discussed before us; and I think it better not dispose of the question, which I have suggested, without further argument.

On the 4th of June this case was reargued as to the rights of the defendants as joint contractors or principals.

Mr. Robinson, as I understand him, admitted that if the new arrangement amounted to a new contract the defendant would not be liable after that date.

Upon the best consideration I am able to give to the matter, I think the new arrangement did amount to a new contract, whereby the territory was lessened and the remuneration changed, and possibly also lessened; and that the defendants are liable for default up to the date of that arrangement, but not thereafter; and, to such extent, the judgment must be varied.

If the parties cannot agree upon the statement of accounts, I suppose there must be a reference, and costs reserved until after reference. The plaintiffs must have the costs of the action, save as to the costs of this motion, to which neither party is entitled, as neither has wholly succeeded.

CAMERON, C. J.—I concur in the opinion just delivered by my learned brother Rose, that the plaintiffs are entitled to recover from the defendants all moneys received by their agent Boughton on account of the plaintiffs, less salary and commission, up to the 18th day of July, 1884, and not after, for the following reasons: The change in the extent of his agency affecting his probable income was such a change as would have discharged the defendants Cluxton and Case *qua* sureties.

By the clause in the bond, declaring that they renounce the benefits of sureties and consent to be bound as fully in all respects as the principal, to have any legal effect or meaning, it must impose upon them the same liability as attached to the agent Boughton during the continuance of the agency under the terms of the original agreement. That provision, however, gave no authority to Boughton and the plaintiffs to change the extent or nature of the employment; and the moment such change was made the defendants Cluxton and Case would have been, in accordance with the principles of equity applicable to the relationship of surety and principal, as sureties discharged from all liability on account of their principal in respect of his misconduct as well before as after the change in the extent of his employment. But he clearly would be bound to account to his principals for all moneys received by him up to that time, and so to that extent the declaration in the bond made by Cluxton and Case that they "consent to be bound as fully in all respects as the principal party" makes them liable.

Boughton to an action on the bond for not having accounted for moneys received by him up to the time his agency was restricted to the city of Toronto, could not have successfully pleaded the arrangement by which that restriction was effected as a bar to the breach assigned; and, if he could not, I do not see why Cluxton and Case, who have consented to be bound as principals and not merely as sureties, should have any greater immunity.

The obligation of the principal, so to call him, according to the condition of the bond, was "to perform his duties as agent of the company, and to pay over moneys for which he should be responsible as such agent;" and he is certainly responsible for all moneys received by him on account of the plaintiffs, while the employment provided for by the agreement continued, and the like responsibility attaches to the defendants Cluxton and Case by the express terms of their contract.

If the agent Boughton on the 18th July, 1884, had voluntarily thrown up his agency, and refused to act as agent for the plaintiffs, I presume there would be no doubt whatever both he and the defendants Cluxton and Case would have been liable for any moneys received by him on account of the plaintiffs up to that time; and I do not see on what principle it can be held that his agreeing to accept a more limited agency than he had before relieves him from such liability, or those who have become bound for him as principals and not as sureties.

It is not pretended, and if it were the evidence would fail to make out the pretence, that the arrangement to take the more limited agency was to be in satisfaction of any previous default on the part of Boughton.

Then, on the other hand, I do not see why the defendants Cluxton and Case should be held liable for his intrusions or defaults in respect of his restricted agency, as they never undertook to be bound for him in that more limited sphere of action and source of emolument; and though it may be said by the original agreement he was agent for Toronto, by reason of the axiom the greater includes the less, there is a wide difference between being general agent for the Province with certain special exceptions and being agent for Toronto alone, though that may have constituted the most profitable portion of the agency. It is not one and the same thing as being general agent for the Province; and, therefore, the moneys received as agent for Toronto alone were not received by virtue of his original employment as general agent for the Province.

I have not been able to find any decision in which the effect of such a provision as that contained in the bond in question has been considered. But as there is no principle of law which prevents a person making any contract he chooses, I do not see why these defendants could not stipulate, as they have done, that they should be liable as principals, nor why that stipulation should not be enforced against them in the same manner as if they were in fact as well as by their own agreement principals.

The evidence, while it discloses the full amount due from the defendant Boughton to the plaintiffs, does not shew what portion of the amount so due accrued in respect of matters before the change in the extent of his agency was made.

If, therefore, the parties cannot agree upon that amount there must be a reference to take the account; and in doing so the referee will charge against the defendants all moneys received by Boughton up to the 18th July, 1884, and credit them with all commissions and salary payable to him up to the same date.

Judgment to be entered for the plaintiffs against all the defendants for the amount found by the report of the referee, with costs, as stated in the judgment of my learned brother.

GALT, J., concurred.

Judgment accordingly.

[CHANCERY DIVISION.]

HYMAN & CO. V. HOWELL ET AL.

*Assignment for creditors—Costs of attacking a fraudulent preference—
Making good to the estate moneys spent on useless legal proceedings—
Acquiescence by creditors in misuse of moneys and estate.*

W. assigned all his estate by deed to B., one of his creditors, in trust for his creditors generally. Afterwards, at a meeting of creditors it was resolved, with B.'s consent, that M., as an execution creditor of W., should bring an action on behalf of all the creditors of W. to consent the validity of a certain chattel mortgage made to H. & Co., by W., prior to the above assignment to B., the costs of which the creditors present agreed should be borne by the estate. H. & Co., were not present at the meeting. This action by M. was dismissed, with costs, and B., who had retained the solicitor and really managed and controlled the action, paid the defendants H. & Co.'s costs of that action, and also the costs of the solicitor who acted for M., out of the moneys of the estate, \$462 in all.

H. & Co., as creditors of W., now brought this action asking that the executors of M. should pay the \$462 to B. to be distributed among the creditors of W.

There was no evidence of M. or his executors having requested B. to pay the \$462 of costs.

Held, that as to the \$300 paid to M.'s solicitor no request on M.'s part to B. to pay this to the solicitor could be implied, for M. did not retain the solicitor or manage the proceedings, but merely allowed his name to be used as plaintiff, and M. was not liable to the solicitor as to those costs, and therefore the plaintiff failed as to that sum, though, *semble*, B. had no authority to expend moneys of the estate in endeavouring to get or obtain property not assigned to him.

Held, also, that the plaintiffs could not succeed as to the balance, \$162, for there could be no reasonable doubt that they knew that this \$162 which was paid to them by B., as their costs of defence, was moneys of the estate of which B. was trustee, and must be held to have assented to its being so paid.

THIS was an action brought by C. S. Hyman & Co., suing on behalf of themselves and all other creditors of one Robert Whittaker against William Allen Howell and John Heaseman executors of the will of William Meehan, deceased, and one C. E. Bourne, claiming that an account might be taken of certain sums of money paid by the defendant Bourne for and at the request of the defendants Howell and Heaseman, and that they might be ordered to repay the same to the said Bourne to be distributed among the creditors of the said Whittaker; for costs of action and further relief.

The facts of the case are set out in the judgment.

The action was tried before Ferguson, J., at Chatham on December 6th, 1886.

Gibbons, for the plaintiffs. A person interested in a trust fund may proceed against a person who has wrongly received the trust money knowing that it was trust money: *Bank of British North America v. Mallory*, 17 Gr. 102; *Alsager v. Rowley*, 6 Ves. 748; *Yeatman v. Yeatman*, 7 Ch. D. 210; *Holms. Ch. O. pp. 38, 47*. The costs in question were paid by the trustee to the solicitor who brought the action *Meehan v. Hyman*, and it is admitted that the said solicitor knew that the money was trust money. See *Rogers v. Rogers*, 13 Gr. 457.

Lash, Q. C., for the defendants Howell and Heaseman. The action was commenced on the faith of the decision in *Parkes v. St. George*, 2 O. R. 342, but this was reversed before the trial of the action: 10 A. R. 496. *Macdonald v. McCull*, 9 O. R. 185, shews that an action brought by a creditor in this way is for the benefit of all the creditors. It was managed and controlled by the assignee, to whom alone the solicitor looked for his costs. It was similar to the case of an assignee suing in the name of his assignor. The assignor plaintiff would be liable for the costs if he failed, but not for the costs of the assignee's solicitor.

C. E. Barber, for the defendant Bourne. The plaintiffs charge fraud, and this is the only reason for our appearing here. The plaintiffs were actors in the breach of trust of which they complain.

Gibbons, in reply. The trustee has no power in regard to property not assigned to him, and had no power to deal with the assets in endeavoring to get more than what was assigned to him. The \$462 should be ordered to be put back into the estate.

January 7, 1887. FERGUSON, J.—One Whittaker, who was carrying on a commercial business in the village of Jarvis, and who was largely indebted to the plaintiffs and

others, on the 7th day of March, 1884, by deed assigned and transferred all his estate and effects, consisting of a general stock of merchandise, book debts, &c., to the defendant Bourne, who was one of his creditors, for realization by sale, collection and otherwise, and for distribution of the proceeds after payment of proper and legitimate expenses among his creditors ratably and proportionably without preference or priority, and upon the execution of this deed the defendant Bourne assumed the trusts for creditors under the same.

At a meeting of the creditors duly called by the defendant Bourne as such trustee, held on the 18th day of March, 1884, it was resolved that an action should be brought on behalf of the creditors generally, to contest the validity of the preference claimed by the plaintiffs under and by virtue of a chattel mortgage made and executed prior to the date of the assignment by the said Whittaker in favour of the plaintiffs. The creditors at the meeting, fearing that there was at least great difficulty in the way of Bourne, the assignee and trustee, maintaining such an action, a solicitor who was present was consulted by them, who advised that judgment and execution should be recovered on the claim of one of the creditors of Whittaker, and that an action should be brought in the name of such execution creditor for the benefit and on behalf of all the creditors of Whittaker against the present plaintiffs to set aside the chattel mortgage aforesaid then held by the plaintiffs. A creditor, William Meehan, since deceased (the executors of whose estate are the defendants Howell and Heaseman), at the request of the creditors present at this meeting, and of the assignee Bourne, assented that such judgment and execution should be recovered for his claim, and such action brought in his name by the said solicitor for the benefit of the creditors generally; and it was then agreed by the creditors present that the costs of and incidental thereto should be borne and paid by the estate assigned as aforesaid. The plaintiffs were not present or represented at this meeting. The evidence is that all

the creditors were notified in the usual way. The meeting was for the purpose generally of considering and deciding upon the manner of winding up the estate, and not for any special purpose.

Soon after this meeting an action was brought in the name of the said Meehan against the present plaintiffs, for the purpose of setting aside as preferential and void the said chattel mortgage. That action was brought as was advised at the meeting of creditors by the solicitor, who was present at the meeting and gave the advice. It was in the name of Meehan as plaintiff, but the proceedings were managed and controlled by Bourne, the trustee and assignee. The action was (as it was said owing to the decision of the Court of Appeal in the case of *Parkes v. St. George*, 10 A.R. 496), dismissed, with costs to be paid by the plaintiff therein to the defendants therein (the present plaintiffs.) There were then two amounts of costs to be paid, the costs to the plaintiff's solicitor in that action and the costs ordered to be paid to the defendants therein. That solicitor did not claim these costs from Meehan, or render any bill of the same to him, but received payment thereof (\$300) from the defendant Bourne, the assignee and trustee, out of the moneys of the estate, and Bourne also paid the costs of the defence of that suit to the present plaintiffs out of the same fund or estate. These costs amounted to \$162, so that in all Bourne paid out of the moneys of the estate in his hands as aforesaid the sum of \$462 costs of that action.

At the time of the assignment to Bourne, Whittaker was in insolvent circumstances and unable to pay his debts in full, and Bourne is now in insolvent circumstances and unable to refund and repay these costs if he were ordered so to do. The plaintiffs are large creditors of Whittaker, and they say that they are entitled to receive nearly the whole amount of these costs (the \$462), and that the same were so paid as aforesaid through the fraudulent collusion of the defendants to defeat the plaintiffs and other creditors of Whittaker entitled to participate therein. The plaintiffs ask for an account (which is now unnecessary, as

counsel have agreed upon the amounts as above), and that the defendants Howell and Heaseman be ordered to pay the amount to the defendant Bourne, to be by him distributed amongst the creditors of Whittaker. They also ask for costs and for general relief. Meehan was, and his estate now is, a creditor of Whittaker for a considerable sum.

In October, 1885, the present plaintiffs brought an action on behalf of themselves and all other creditors of the estate of Whittaker against the defendant Bourne, seeking to have the estate of Whittaker in his hands administered under the direction of the Court, and such proceedings were had in that action that judgment was given thereon, declaring Bourne to be a trustee for the plaintiffs and the other creditors of Whittaker of the estate and effects under the deed of assignment, and referring the action to the Master at London to take an account of the estate and of the dealings of Bourne therewith, and also an account of the persons entitled to share therein, or in the proceeds thereof, and in what shares and proportions respectively, and ordering the defendant Bourne to pay into Court to the credit of the action, the balance which should be found to be in his hands on the footing of such account with other directions usual in such cases. The plaintiffs brought the judgment in that action into the Master's office, where the reference is now pending. And the defendants in the present action contend that in any view of the rights or liabilities of the parties on the actual merits the present action is wholly unnecessary and vexatious, and should accordingly be dismissed, &c.

The foregoing is a statement, though perhaps not a full statement, of the facts. Only one witness was sworn at the trial, and his testimony is very short indeed. A paper of admissions was signed by counsel, which was substituted for evidence.

The chattel mortgage made by Whittaker to the plaintiffs was earlier in point of time than the assignment to Bourne, and it was contended by the plaintiffs that the

defendant Bourne had no power or authority whatever to expend moneys of the estate that was assigned to him in trust in endeavouring to get or obtain property that was not assigned to him. In this contention I think the plaintiffs are right, and I think the case *Houstin v. Robins* in this Division of the Court—though not reported so far as I am aware—goes a long way, if not the entire length of shewing this. The plaintiffs, however, do not in this action appear to seek to have an order made against Bourne for the money, the subject of the dispute. Their prayer (to use their own words) is: "That an account may be taken of the said sums of money paid by the defendant Bourne for and at the request of the defendants Howell and Heaseman, and that they be ordered to pay the same to the defendant Bourne to be distributed, &c.

It is apparently assumed that these two sums paid by Bourne were paid at the request of the defendants Howell and Heaseman. There is not any evidence of such a request in fact by these defendants or by their testator Meehan. As to the \$300 paid by Bourne to the plaintiffs' solicitor for costs in the action *Meehan v. Hyman*, the one that was as before stated dismissed, with costs, I do not perceive any good ground for saying or contending that there was such a request by implication of law. Meehan merely allowed his name to be used as plaintiff because of the assumed difficulty or impossibility of the action succeeding if brought with Bourne as plaintiff. He did not retain the solicitor, or manage, or direct, or control the proceedings. All this was done by Bourne, he thinking that he was acting for the best interest of the creditors other than the present plaintiffs. There is no evidence whatever of the fraud or collusion alleged. But for the decision in *Parkes v. St. George*, 10 A.R. 496, which was unforeseen at the time the action was commenced, it might have succeeded. Counsel for the defendants, the executors of Meehan, contended that in respect to costs, the position of Meehan in that action was much the same as the position of an assignor of a bond or other chose in action when the suit was brought

by the assignee in the name of the assignor, and that in such a case the claim of the solicitor for the plaintiff for costs would be against the assignee who retained him, and who had the interest in the bond or cause of action sued upon, and not against the assignor who had no interest in the matter, and had not retained the solicitor. I think this argument well founded, and that as regards the \$300 parcel of the money in contention Meehan was not liable to the solicitor. As I have already said no request by him to Bourne to pay this sum was shewn, and I fail to see how his estate can be made liable for the amount. Then as to the \$162 the other parcel of the moneys, this sum was received by the present plaintiffs from Bourne, the assignee and trustee, as their costs of defence of that suit, and there can be no reasonable doubt as to their knowledge that the moneys so secured by them were moneys of the estate of which Bourne was trustee under the assignment; and I think the spirit of the case *Dillon v. Township of Raleigh*, 13 A. R. 53, at pp. 67 and 68, is applicable here, and that the present plaintiffs, even though they had a claim against Meehan for this \$162, must be taken to have assented to its being paid them out of the trust moneys in the hands of Bourne, the assignee, and they cannot, I think, succeed in their contention as to this sum.

These two sums are all the moneys in contention, and I think the case of the plaintiffs fails as to each of them, so far as they make their claim against the executors of the estate of Meehan.

No specific demand is made in this action against the defendant Bourne in respect to these two sums of money, or either of them. What is asked is that the moneys be paid by the other defendants to him to be by him distributed amongst the creditors of Whittaker. Besides it appears to me that any relief that could be had against the defendant Bourne in respect to these moneys could have been and can be obtained in the suit before referred to in which the reference is pending before the Master at

London, and as to him this action, in any view as to his liability, was unnecessary.

I am of the opinion that the action should be dismissed, with costs, and there is judgment dismissing the action accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

COMSTOCK V. HARRIS.

British ship—Alien mortgagee—Imperial Statute, 17 and 18 Vic. ch. 104.

The mortgagee of a British ship is not an owner within the meaning of of Imperial Statute 17 and 18 Vic. ch. 104, and there is no provision in that statute to prevent an alien being a mortgagee.

THIS was a demurrer to the fourth paragraph of the statement of defence (set out in the judgment) in an action brought by Edward Comstock against George Archibald Harris on two mortgages of vessels alleged to be registered under the Merchants' Shipping Acts for the sale of the vessels, and on the covenants for payment therein contained,

The demurrer was argued on January 12th, 1887, before Proudfoot, J.

J. MacLennan, Q. C., for the demurrer. The plaintiff's demurrer is founded on the contention of the defendant that the plaintiff cannot take a mortgage or become an owner of a British ship, because he is an alien. The Imperial Merchant Shipping Act, 1854, is 17 & 18 Vic. ch. 104. The defendant relies on sec. 18. Our Shipping Act takes in all the provisions of the Imperial Act that are not inapplicable. An alien may build a ship in a British port and dispose of it, but he cannot register it. Sec. 38 shews that in order to become a registered *owner* a declaration, form B, which states that

he is a British subject must be made. A mortgagee need not make any declaration, and yet he enters his mortgage on the register. By sec. 53, if any registered ship is destroyed or passes to an alien the register is to be closed, and the ship ceases to be a British ship. That recognizes the fact that an alien can become an owner. Sec. 70, shews that a mortgagee is not to be deemed an owner. The mortgagee may sell, but if he does not sell to a British subject the only effect is that the ship ceases to be a British ship. Secs. 73 & 74 provide for the transfer of a mortgage or mortgagee's interest to *any* person.

Lash, Q. C., contra. The demurrer is to the fourth paragraph of the statement of defence. Paragraphs five, six, and seven are all to be read with the fourth. The plaintiff cannot demur to the fourth only. [PROUDFOOT, J., If one paragraph is a complete answer to plaintiff's claim it can be demurred to.] The rules compel the defendant to divide his pleadings into paragraphs. The rest of the pleadings may be looked at, and if the demurrer is wrongfully confined to one part it is bad: *MacLennan's* Judicature Act, 2nd ed. 288, 289, 332 to 337; *Young v. Robertson*, 2 O. R. 434 *Grant v. Eddy*, 21 Gr. 568; *Rumohr v. Marx*, 29 Gr. 179; *Attorney-General v. The Midland R. W. Co.*, 3 O. R. 511. By paragraph five it appears Harris mortgaged to plaintiff, an alien. After default plaintiff took possession and assumed to sell to defendant, but in reality defendant was plaintiff's agent. The plaintiff not being a British subject could not be registered as owner. The defendant then gave the mortgages to the plaintiff. In this way the defendant says that he got no proper title, and that his covenants were entered into through the fraud of the plaintiff, as the ships became forfeited: *The Annandale*, 2 P. D. 179. The forfeiture took place at the time of the actual committing of the act. The question raised by this demurrer should not be decided on a technical construction of the sections, but upon the broad policy of the British Merchants' Shipping Act, and that is that a foreigner shall not be an owner of a British ship. The

only reason the statute does not make a mortgagee an owner is to facilitate the obtaining of money on ships, as mortgagees do not become liable for the vessel's debts, &c., as owners do: *Boyd's Merchant Shipping Laws* p. 72, note to sec. 70; *Newson's Digest of Shipping Insurance*, 2nd ed., 21. A mortgage is an absolute transfer of the shares in the ship. A mortgagee on taking possession becomes the owner.

MacLennan, Q. C., in reply. The Court cannot look at the other paragraphs of the statement of defence, as the defences set up by them are distinct from that in paragraph four, which latter is a complete defence (if any) in itself. The demurrer goes to the root of the whole defence. The policy of the statute may be to prevent an alien from becoming an owner, but it certainly is no part of that policy to hamper or prevent a British owner getting money from an alien on his ship. Ships are built in British ports for aliens, and sold to aliens. The object of registration is to give certain privileges to navigation.

February 2, 1887. PROUDFOOT, J.—The plaintiff brings this action upon a mortgage of the ship *Minnie* made by the defendant to the plaintiff on the 1st November, 1876, and upon a mortgage of the ship *Gatineau*, made on the same day by the defendant, to the plaintiff, both of which were given to secure payment of \$8550, and interest at 7 per cent. per annum at times which have all elapsed, and in default asks that the vessels be sold. Some payments have been made and the sum remaining due is stated to be \$4373.04.

And the defendant covenants to pay the moneys so secured.

Among other defences is the following:

"4. The defendant says that the ships *Minnie* and *Gatineau* were, and are, and always have been British ships, and were duly registered as such prior to the dates of the indentures of mortgage in the statement of claim mentioned. and that the plaintiff was not a British subject by birth'

naturalization, or denization, but, on the contrary, was, and always has been, a citizen of the United States of America, and was therefore, as such, disqualified to own, have, or hold any share or shares, interest or interests, property, lien, mortgage or mortgages, in or upon such ships within the British possessions under the shipping laws then in force within the Dominion of Canada."

The plaintiff demurs to that fourth paragraph of the statement of defence, because suing as mortgagee he is not disqualified by reason of his being a subject of the United States of America from being such mortgagee, and from recovering the amount covenanted to be paid by the defendant to him.

There are other defences which the defendant contends should be referred to in order to determine if the demurrer to the fourth paragraph is a proper mode of testing the question, upon the authority of *Young v. Robertson*, 2 O. R. 434; *Grant v. Eddy*, 21 Gr. 568; *Rumohr v. Marx*, 29 Gr. 179, and *Attorney-General v. The Midland R. W. Co.*, 3 O. R. 511.

But I do not think these cases govern the present. For the other defences in the fifth, sixth, and seventh paragraphs form entirely distinct defences, and in no wise dependent upon the fourth paragraph, though they do involve the question of the capacity of an alien to be a mortgagee. The fifth paragraph sets out a mortgage of these ships by one Hebron Harris to the plaintiff, an alien, on the 19th Sept, 1873; that Hebron Harris became insolvent, and the plaintiff took possession of the ships on the 4th of May, 1876, and on the 26th May, 1876, sold them to the defendant without authority from any Court. The sixth paragraph says that subsequently the plaintiff caused himself to be registered as owner of these ships, and assumed as such owner to sell and convey them to the defendant. The seventh paragraph sets up that if defendant gave the mortgages (which he denies), he did so on the false representation of the plaintiff that the plaintiff had given him a good title, and upon that representation the covenants (if any) were entered into.

The fourth paragraph denies the capacity of the plaintiff an alien to be a mortgagee under the indentures of the 1st November, 1876. The fifth refers to a prior mortgage, and a sale under it. The sixth paragraph seems to allege a second sale to the defendant; but the gravamen of the defence there is, that the plaintiff had caused himself to be registered as owner. This would cause a forfeiture of the plaintiff's interest. The seventh paragraph depends upon a question of fact, viz., whether the plaintiff made any such representation as there alleged. They all form distinct defences; and it seems to me that a demurrer is a proper enough mode of objecting to the defence in the fourth paragraph.

That fourth paragraph is set up as a defence to the whole cause of action; and it might be disposed of at once as covering too much. For the plaintiff seeks not only a sale of the ships, but payment under the covenants. It is no defence to an action of covenant that plaintiff is an alien.

But as the question was argued whether or not an alien can be a mortgagee of a ship, I will not dispose of the case upon that technical ground.

The learned counsel were not able to refer me to any decisions upon this question, nor have I been able to find any myself, and it will have to be determined upon a consideration of the Shipping Acts.

The Legislature has shewn zealous care that British ships shall only be owned by British subjects. And Sir William Evans, in a note to 34 Geo. III. c. 68, s. 14, remarks that, "The policy of the navigation Acts would probably require the mortgagee to have the same qualifications as are necessary in the case of an owner, with the exception of general trusts for the benefit of creditors or underwriters." But at that time there was no provision for the registry of mortgages of ships, and if a mortgage was intended it had to be by an absolute bill of sale, and upon the registry the mortgagee would appear as the owner; and, indeed, if he chose, he might be the owner. "The language in many of the cases was in favour of the conclusion, that

there could be no equitable ownership of a ship distinct from the legal title, and that upon a transfer under the forms of the Registry Acts the ship becomes the absolute property of the intended mortgagee, and that the terms and the policy of the Registry Acts were incompatible with the existence of any equity of redemption :” 3 *Kent’s Com.* 148.

This course of decision was modified afterwards, and in *Thompson v. Smith*, 1 Madd. 395, Sir Thomas Plumer held that there might be a valid mortgage of a ship ; but there would seem to have been a difficulty in getting a defeasance on the bill of sale upon the registry, for he said that though the defeasance should not be noticed in any of the forms adhered to at the office of the customs, and the instrument should be registered as an absolute bill of sale, the mortgagor’s right of redemption would not suffer by the omission. It is not surprising that under that state of the law Sir William Evans should have thought the mortgagee ought to have the same qualifications as an owner. It was not till the 6 Geo. IV. ch. 110 that the difficulties attending the doctrine of mortgages under the former statutes were removed.

The question, however, must now be decided under the provisions of the Imperial Statute 17 & 18 Vic. ch. 104. The Dominion Statute 36 Vic. ch. 128 seems, so far as mortgages are concerned, to refer to giving security for advances made on ships in course of construction.

The 17 & 18 Vic. ch. 104, s. 18, requires a British ship to be owned by a British subject ; sec. 38 requires him to make a declaration to that effect before he can register : sec. 40 permits a foreign built ship to be registered if owned by British subjects : sec. 56, no transferee shall be entitled to be registered unless he is a British subject : and by sec. 62, where the property has devolved by the operation of law upon an alien the ship is to be sold. Secs. 76 and 81 provide for the case of a sale out of the country which may be to an alien, and in that case the registry is to be closed, *i. e.*, the ship ceases to be British ; and sec.

103 inflicts the penalty of forfeiture for unduly assuming a British character.

Without registration the ship is not recognized as British, sec. 19; is excluded from limited responsibility, sec. 516; and see *The Georgian Bay &c. Co. v. Fisher*, 5 A. R. 383. It is stripped of the protection of the British flag, secs. 19, 103, and 106.

The provisions with regard to mortgages are very different. They are silent as to the necessity of a mortgagee being a British subject, secs. 66, 67; and compared with secs. 55, 57, it would seem that registration is not compulsory. No declaration of nationality is required from a mortgagee, sec. 66. The mortgagee is not to be deemed the owner, sec. 70. A transfer of a mortgage may be made to any person, sec. 73. The form K, containing the form of transfer of a mortgage, says nothing about the transferee being a subject; while form F, the declaration of ownership by transferee, requires the transferee to be a subject. In the case of a transmission of ownership by operation of law there seems to be no disability from alienage: sec. 74, form L. Where an owner desires to mortgage out of the country, when it may be to an alien, there is no provision for closing the registry as in the case of sale to an alien. Mortgagees are exempted from liabilities as owners by sec. 100.

In all these particulars a marked distinction appears to be drawn between owners and mortgagees. And mortgagees cannot become owners by virtue of their mortgage, for the remedy is not by foreclosure but by sale.

Besides, there is the analogy between mortgages and bottomry bonds. These last give a lien upon the ship, and are most frequently given to aliens, and it is quite clear that they are valid: 2 *Levi's International Law*, 796.

I may notice, also, that the Imperial Naturalization Act of 1870, 33 Vic., ch. 14, sec. 14, repeats the disability by enacting that nothing in that Act should qualify an alien to be the owner of a British ship.

The conclusion I have come to is, that the mortgagee is not an owner, and that there are no provisions in the statute that prevent an alien being a mortgagee.

The demurrer is therefore allowed, with costs.

G. A. R.

[CHANCERY DIVISION.]

RE MURRAY AND KERR.

Vendor and purchaser—Representation as to rents in advertisement—compensation—Heating—Taxes.

K. purchased certain property at auction which had been advertised. Among the representations made in the advertisement, was one that it "at present rents for \$1,160." After the sale the purchaser applied for compensation on two grounds: (1) That the landlord was bound to heat the building for the tenants, the cost of which was not included in the \$1,160; and (2), That the \$1,160 did not include the taxes which the landlord had to pay.

Held, that he was entitled to compensation on both grounds, and a reference was ordered to ascertain the amounts.

THIS was an application under the Vendor and Purchaser Act R. S. O., c. 109, in respect to an allowance for compensation.

The petition was filed by Thomas Murray as executor and trustee under the will of William Hague, and alleged a sale by auction by him of the property and a purchase by George Kerr, Jr., and showed that one of the representations made in the advertisement of the property was, that it "at present rents for \$1,160."

After the sale the purchaser discovered that the landlord was liable to keep the furnace supplied with coal and heat the building for the tenants, costing annually from \$150 to \$180, and that the annual expenditure for taxes was \$139.10, and he claimed compensation therefor.

The petition asked that these claims be disallowed, and the contract carried out as entered into.

The petition was argued on March 9, 1887, before Ferguson, J.

E. T. English, for the vendor. The petitioner is a trustee, and cannot make any allowance by way of compensation without the sanction of the Court. Perhaps the purchaser may be entitled to something in reference to the heating, but he certainly is not in reference to the taxes. They are a burden on the landlord in all cases.

Hoyles, for the purchaser. The purchaser is entitled to compensation on both heads. The representation was as to the net rentals, and misled him completely. "Rentals," or "rents for," means so much on the principal purchase money. Compensation can be had at any time, even after conveyance. *Barber v. Barber*, 11 P. R. 137. The purchaser was entitled to believe the advertisement and to put the most favorable construction upon it, and was not bound to enquire from the tenants: *Manson v. Manson*, 10 P. R. 155. I refer also to *Re Turner and Skelton*, 13 Ch. D. 130; *Palmer v. Johnson*, 12 Q. B. D. 32 at 36 and 13 Q. B. D. 351; *Caballero v. Henty*, L. R. 9 Ch. 450; *Fry*, on Specific performance, 2nd ed. 524.

English, in reply. All landlords must pay taxes in the absence of special arrangement: *Clerke & Humphrey* on Sales, 69.

At the close of the argument the learned judge decided that the purchaser was entitled to compensation in respect to the heating, and reserved judgment in respect to the taxes.

March 10, 1887. FERGUSON, J.—During the argument I decided in favor of the purchaser in respect to the objection as to the landlord being obliged to supply the tenants with coal for the furnace and to heat the building. Mr. English did not appear in the end to dissent from this view, but excused himself for being before the Court so far as this subject is concerned, on the ground that the vendor is a trustee only.

The other question is, as to a representation in the advertisement that the building "at present rents for \$1,160 per annum." This was literally true in one sense, for the sum of the rents is this amount. The objection is, that the owner, and not the tenants, was to pay the taxes, which fact has the effect of reducing the income from the property very considerably. The purchaser says that he understood from the above statement that the \$1,160 was the net annual income from the property by way of rent, and he wants compensation on account of the sum being necessarily diminished by the amount of the taxes.

Ordinarily it is not necessary to state that the property is subject to burdens to which all lands are *prima facie* subject: *Clerke & Humphrey's Sales of lands*, p. 69. It may be quite different in a case of this kind when the rental of the land is stated.

If the vendor uses terms reasonably capable of misconstruction or ambiguous words, the purchaser is not bound to take upon himself the peril of ascertaining the true meaning of the statement, but may generally construe it in a manner most advantageous to himself: *Fry*, 2nd ed. sec. 1,154.

In the conditions of sale it is stated that the property would be sold subject to a monthly tenancy of the ground flat: to a lease of the second flat for five years, ending 1st May, 1889: to a yearly tenancy of the third flat to the Sons of England, and to a yearly tenancy of the fourth flat to the Wilton Oddfellows' Lodge.

Taking these statements and the one respecting the total annual rent as above, was it reasonable that the purchaser should understand the matter as he says he did?

He reads an affidavit of a gentleman who is a land agent, well accustomed to such dealings and matters, who swears that he was present at the sale, and heard the conditions and advertisement read, and that he understood it (the matter) in the same way as the purchaser did. I think the statement might reasonably be understood either way.

No evidence is brought forward of any one having understood the statement according to the vendor's contention.

It would have been an easy thing for the vendor to have stated the fact unmistakably. He did not do this. The purchaser was not bound to make enquiry of the tenants: *Caballero v. Henty* L. R. 9 Ch. 447.

I think the purchaser's contention is maintainable, and that there should be a reference to the Master to ascertain the compensation in respect of both grounds of objection or difference, and that the purchaser should be paid his costs of the application.

G. A. B.

[CHANCERY DIVISION.]

VANDERVOORT V. YOUKER.

Demurrer—Averment of malice—Implied malice—Reasonable and probable cause of belief of larger amount due.

Y. issued a capias before judgment against V. and had him arrested. After the arrest V. tendered \$90 in full of Y.'s claim, which was refused as not being sufficient. Y. then proceeded with his action, but failed to obtain a judgment for more than \$90.

In an action by V. against Y., claiming damages for wrongful arrest, in which no malice was alleged.

Held, on demurrer, that malice would not be inferred, because so far as appeared from the pleadings Y. had reasonable and probable cause for thinking that V. owed him more than \$90, and as malice was not alleged, the demurrer must be allowed with costs.

THIS was a demurrer to the statement of claim in an action brought by Manly Bird Vandervoort against William Youker.

The statement of claim demurred to is set out in the judgment.

The demurrer was argued on March 9, 1887, before Ferguson, J.

Aylesworth, for the demurrer.—It appears that a writ of *capias* was issued under the Arrest and Imprisonment for Debt Act R. S. O., c. 67, and the Common Law Procedure Act R. S. O. c. 50, by Youker against Vandervoort, for a claim of over \$100, and the arrest was made. Vandervoort then tendered \$90 in full of the claim for which the *capias* was issued, and this sum was refused as not being sufficient. Youker then proceeded with his action and failed to recover more than \$90, hence this action.

There is no averment of malice or of absence of reasonable or probable cause in the statement of claim herein. No action lies for an arrest merely; it must be a malicious arrest. There may even be malice so long as there is reasonable and probable cause: *Daniels v. Fielding*, 16 M. & W. 200; *Cunningham & Mattinson's* Precedents, 2nd ed. 388; *Bullen & Leake's* Precedent's, 3rd ed. 350, *et seq.* There must be special damage. All the defendant says is: that the plaintiff claimed too much. Costs are not damage sufficient to maintain this action. Special damage must be alleged and proved: *Churchill v. Siggers*, 3 El. & B. 929.

Lash, Q. C., *contra*.—The cause of action is not malicious arrest. Vandervoort was held to bail for over \$100 when the true debt was under \$90. \$90 was tendered and refused wrongfully. Vandervoort was forced to go on and defend the action, and less than the amount tendered was recovered. He was entitled to be discharged when he offered the \$90, and he was after that tender was made wrongfully kept in custody. The refusal of the proper amount is *prima facie* evidence of malice: malice in such a case will be inferred. *Crozer v. Pilling*, 4 B. & C. 26; *Jenings v. Florence*, 2 C. B. N. S. 467. The costs and expenses during detention and of obtaining discharge were special damage, which were sufficiently alleged, and the cause of action sufficiently shown to defendant: *Gilding v. Eyre*, 10 C. B. N. S. 592.

Aylesworth, in reply.—In *Crozer v. Pilling*, *supra*, the proper amount was tendered because it was ascertained, the

arrest being after judgment: here Youker was honestly of the belief that more was coming to him. Malice must be alleged: O. J. A. Rule 136. I refer also to *Scheibel v. Fairbain*, 1 B. & P. 388; *De Medina v. Grove*, 10 Q. B. 152; *Tuckett v. Eaton*, 6 O. R. 486.

March 10, 1887. FERGUSON, J.—The statement of claim demurred to is substantially as follows:—

For that the defendant claiming that the plaintiff was a debtor of his for the sum of \$100 and upwards caused the plaintiff to be arrested at his (the defendant's) suit upon a writ of *capias*, and the plaintiff tendered the sum of ninety dollars in full satisfaction of the defendant's debt, upon which the plaintiff was arrested, which was by him refused as not being a sufficient sum, whereas the defendant (the plaintiff in that suit) recovered a lesser sum against the present plaintiff, and the present plaintiff was put to large expenses and costs and loss of time by reason of the defending of that action so wrongfully maintained against him, and the obtaining of his discharge therefrom.

On the argument counsel admitted that malice must be considered as the ground of the action, and that in the absence of malice no action of this kind could be maintained. He contended, however, that malice is alleged, because it is to be inferred from the fact which is alleged that the defendant refused to accept in full satisfaction of the debt claimed the sum of ninety dollars that was tendered by the present plaintiff, and that the judgment obtained against the present plaintiff (in that suit) was for a sum less than the ninety dollars. But it appears to me to be entirely consistent with this allegation that the present defendant had reasonable and probable cause for believing, and did believe that the amount then owing to him by the present plaintiff was a sum much greater than the sum tendered, and a sum exceeding one hundred dollars, and the existence of such reasonable and probable cause would repel the inference of malice. I am, therefore, of the opinion that malice is not alleged.

The case seems to me entirely different in this respect from a case where a judgment has been obtained and a writ of *ca. sa.* issued upon it and endorsed for too large a sum, or for a sum equal to the whole amount of the judgment, when a part of that sum had been paid, for in such a case there could be no reasonable or probable cause for the act.

Rule 136 of the Judicature Act points out one way in which malice is to be alleged. I do not think that either the case *Crozer v. Pilling*, 4 B. & C. 26, or *Jenings v. Florence*, 2 C. B. N. S. 467, is in point in the present case.

I am of the opinion that malice is not alleged at all, and if this view is correct the pleading is insufficient on counsel's own admission. Looking at the statement demurred to even in the light most favorable to the pleader, or in any light in which I can view it, I think it fatally defective, and that the demurrer must be allowed.

Demurrer allowed, with costs.

Leave was asked to amend in case the opinion should be against the plaintiff's contention. This leave must, I suppose, be given on the usual terms.

Judgment accordingly.

G. A. B.

[CHANCERY DIVISION.]

LAWRENCE V. THE CORPORATION OF THE VILLAGE OF LUCKNOW.

Municipal corporation—By-law—Contract—Novation—Meeting of Councillors—Taking possession of building—Acceptance of work on executed contract—Liability of corporation.

The defendants passed a by-law, approved of by the ratepayers, reciting that there was "an urgent necessity for a building to be used by the municipal corporation as a lock-up, fire-hall, council chamber, and public hall," for the purpose of acquiring the land and erecting such a building at a cost of \$4,500, for the raising of which sum, provision was therein made. B.'s tender for carpenter work, &c., (including a shingle roof) was accepted, but at a special meeting of the council at which only three of the councillors with B. and L. the plaintiff, were present, an arrangement was made by which B. threw off \$4 a square, and was relieved of the roof part of his contract, and L. agreed to put on a metallic roof at \$6 a square, and it was resolved by the council that "the iron shingles instead of wooden shingles be put on the roof of the new town hall." All this was done subject to the approval of the Reeve who was not present, but who afterwards approved of it, and at whose instance L. ordered the material and did the work. L. received a payment on account, but on the discovery of some defects in B.'s work, the defendants refused, although they had taken possession of the building, to pay the balance, on the ground that the roof was not properly done, and that L. was a sub-contractor under B., and that there was no contract under seal with him.

Held, (affirming the judgment of O'Connor, J.,) that the legal effect of this was to consummate a tripartite agreement, by which B. was to give up part of his contract, and L. was to do the work for a specified price: that between the plaintiff L., the defendants and B. there was a novation of contract so far as the roof was concerned, and as to that L. became the principal and only contractor.

Held, also, that the taking possession, payment on account, &c., was sufficient evidence to justify a finding of an acceptance of the work as an executed contract, or a case "of an actual and *de facto* performance of the contract by one party of which the other party has taken, received and enjoyed the benefit." *The Mayor, &c., of Kidderminster v. Hardwick*, L. R. 9 Ex. 18, cited; *Munro v. Butt*, 8 E. & B. 738, distinguished.

A municipal corporation is liable on an executed contract for work done by its order, on its behalf and for its benefit, though there be no agreement under seal, if the thing done were urgently required for the purposes of the corporation, and especially so where the price to be paid is not of large amount: *Robins v. Brockton*, 7 O. R. 481, referred to.

THIS was an action brought by Thomas Lawrence against the Corporation of the Village of Lucknow for the price of some roofing on a new municipal hall built for corporation purposes.

The action was tried at Goderich, on October 5th, 1886, before O'Connor J., and a jury.

M. C. Cameron, Q. C., for the plaintiff.

Garrow, Q. C., for the defendants.

It appeared that the Corporation of the Village of Lucknow, an incorporated village governed by a Reeve and four councillors, passed a by-law approved of by the ratepayers, reciting that there was "an urgent necessity for a building to be used by the municipal corporation as a lock-up, firehall, council chamber, and public hall," for the purpose of acquiring the land and erecting such a building at a cost of \$4,500, for the raising of which sum provision was therein made. Tenders were advertised for and that of one Burgess was accepted for doing all the carpenter work, painting, glazing, and eave-troughing, (including a wooden shingle roof to be laid in mortar,) at the price of \$2,408. It was subsequently arranged at a special meeting of the council, at which three of the councillors, Burgess and the plaintiff were present, that Burgess should throw off \$4 per square and get rid of the roof part of his contract, and the plaintiff was to put on a metallic roof at \$6 per square; and it was resolved by the council that "iron shingles instead of wooden shingles be put on the roof of the new Town Hall," subject to the approval of the Reeve who was not present. The Reeve subsequently approved of this, and plaintiff at his instance procured the material, and did the work. The minutes of the proceedings at that meeting were subsequently approved of by the council. The plaintiff also received a payment on account, but as some defect was discovered in Burgess's work on the roof the defendants, although they had taken possession of and used the building, refused to pay the plaintiff the balance of his account on the ground that the roof was not properly done, and that the plaintiff was a sub-contractor under Burgess, and that there was no contract under seal with him. (The further facts are set out in the judgment of the Chancellor.)

Mr. Garrow submitted that there was no evidence of a contract with the plaintiff. That the special meeting was irregular and proceedings there could not bind the council, and referred to *Wood v. The Ontario and Quebec R. W. Co.*, 24 C. P. 334, and *Munro v. Butt*, 8 E. & B. 738.

The case was, by consent of counsel, withdrawn from the jury, and the facts were found by the learned Judge.

October 9th, 1886. O'CONNOR, J.—A jury was sworn to try this case, but at the conclusion of the evidence of both sides, counsel for both parties agreed that it should be withdrawn from their consideration, and that I should decide on the facts as well as the law.

I find the following facts :—

1. I find a by-law for the purpose of erecting a town hall was passed by the defendants on the 5th day of May, 1885; that such by-law had been submitted to, and approved of by the rate-payers. That the debentures issued under such by-law realized over \$4,600, and that such sum was expended in the erection of such town hall.

2. That by resolution of the council passed in anticipation of the adoption of the by-law on 23rd March, 1885, the tender of Mark Burgess for the carpenter work, painting, glazing and eave-troughing, was accepted at \$2,408, this included roofing with wooden shingles.

3. That the defendants decided to change the wooden roof to an iron one, and on 23rd September, 1885, passed a resolution that "iron shingles instead of wooden ones be put on roof of new town hall," Burgess, the contractor, agreeing to credit the defendants on his contract with \$4 per square, which he did, and the iron shingles to cost \$6 per square by agreement with the plaintiff; and in that way the shingling of the roof was withdrawn from the contract with Burgess and let to the plaintiff.

4. That on the 15th of May 1885, the council resolved "that the whole council form a building committee."

5. That the reeve and three of the councillors, being a quorum of the committee, agreed to the resolution of the

council of 23rd September, 1885, and employed the plaintiff to put the iron shingles on said roof.

6. That the defendants on the 10th December, 1885, resolved that the plaintiff "be advanced \$100 on work on hall," and that he was paid that sum by defendants.

7. That the plaintiff did put the iron roof on the hall; that the defendants have not accepted said work by any formal resolution or under seal; that they obtained from said Burgess one of the duplicate keys, and took possession of the hall after plaintiff's work was done: are in possession of it now: have held their meetings in it: have appointed a care-taker of it; and the council on the 10th of February, 1886, passed a resolution instructing the reeve to insure the hall for \$3,000, which was done.

8. The meeting of the council of the 23rd September, 1885, was a special meeting called not by the reeve, but the proceedings of the meeting, and the said resolutions were afterwards assented to, adopted, and acted upon by the reeve.

9. I find that nothing is due to the defendants on their claim of set-off for damages, and thereon I find for the plaintiff, and dismiss the claim.

10. I find a balance due to the plaintiff of \$231.20.

Upon my findings hereunto annexed, I order that judgment be entered for the plaintiff, on or after the fifth day of the next Michaelmas Sittings, or next Sittings of the Chancery Division for \$231.20, and the costs of action.

From this judgment the defendants appealed to the Divisional Court, and the appeal was argued on December 8, 1886, before Boyd, C., and Proudfoot, J.

Garrow, Q. C., for the appeal. The evidence shows that there was no legal or valid contract between the plaintiff and defendants, neither under seal nor even in writing. There was no by-law or resolution authorizing the work or expenditure. The by-law that was passed authorized the raising of the money but not the spending of it. The con-

tracts let, exclusive of the plaintiff's claim and the price of the lot, used up all the money raised. The only claim that the plaintiff has arises out of a special meeting of the council which was irregularly called, and which was attended by only three councillors. It is true Burgess and the plaintiff were present, but they were only there to estimate the difference in the expense of the two different materials. The corporation only consented to Burgess substituting a metal roof for the shingle, and he was to get \$108 more for the difference, but no contract was made with the plaintiff, so that now when the discovery is made of defective work of Burgess the defendants can withhold payment of this claim until the work is made good. The defendants have not taken possession of the building in the sense of accepting the work : *Munro v. Butt*, 8 E. & B. 738. The defective work was not discovered until after the \$100 payment was made. There should have been a by-law, and then a contract under seal. I refer to *Scott v. The Corporation of Peterborough*, 19 U. C. R. 469 ; *Cross v. The Corporation of Ottawa*, 23 U. C. R. 288 ; *The Corporation of Wentworth v. The Corporation of Hamilton*, 34 U. C. R. 602 ; *Potts v. The Corporation of Dunnville*, 38 U. C. R. 96 ; *Armstrong v. The Corporation of West Garamfraxa*, 44 U. C. R. 515 ; *Gibson v. The Corporation of Ottawa*, 42 U. C. R. 180 ; *Silsby v. The Corporation of Dunnville*, 31 C. P. 307 ; S. C. 8 A. R. 524, *Wood v. The Ontario and Quebec R.W.Co.*, 24 C. P. 324 ; *Robins v. Brockton*, 7 O. R. 495 ; *Hunt v. The Wimbledon Local Board*, 3 C. P. D. 215, in appeal 4 C. P. D. 48 ; *Young v. The Corporation of Leamington*, 8 Q. B. D. 579, in appeal 8 App. Cas. 517 ; *Houck v. Town of Whitby*, 14 Gr. 671 ; *The Mayor, &c. of Ludlow v. Charlton*, 6 M. & W. 815. *The Con. Mun. Act*, 1883, 46 Vic. ch. 18, (O) secs. 284, 289, 342, 359 and 482, sub-sec. 1.

Cassels, Q. C., contra. If the defendants have exceeded the appropriation they have paid it away to other parties, and that is no reason why the plaintiff should lose his debt. There is nothing to show that the meeting of the council

at which the alteration of the roof was decided on, was at all irregular. The evidence shows that Burgess was to make an allowance for not having to do the shingling, and Lawrence was to do the metal roof instead. The plaintiff's work was well done, and the defective work, if any, was in Burgess's part of the work. The findings of fact by the Judge who tried the case are amply borne out by the evidence. The defendants have accepted the work and should pay for it. The corporation is bound notwithstanding the absence of a sealed contract: *Robins v. Brockton*, 7 O. R. 481. In *Brown v. The Corporation of Lindsay*, 35 U. C. R. 514, it was held that if the goods were accepted the corporation would be bound. The defendants did not set up want of funds in their pleadings. The corporation had power to build and let contracts for the building and its requisites, and as this metal roof was a necessary part and a matter of small amount as well, there was ample power to incur the liability to the plaintiff without a seal: *O'Brien v. Credit Valley R. W. Co.*, 25 C. P. 278. I also refer to *The Albert Cheese Co. v. Leeming*, 31 C. P. 272; *Brewster v. The Canada Company*, 4 Gr. 443; *Wright v. The Sun Mutual Life Ins. Co.*, 5 A. R. 218; *The Corporation of Elderslie v. The Corporation of Paisley*, 8 O. R. 270 at 284.

Garrow, Q. C., in reply.

January 8, 1887. **BOYD, C.**—Lucknow is an incorporated village, governed by a Reeve and four councillors. In March, 1885, a by-law was submitted to the ratepayers, in which it was recited that there was "an urgent necessity for a building to be used by the municipal corporation as a lock-up, fire hall, council chamber, and public hall," and whereby it was proposed to acquire land and erect thereon a building suitable for such purposes, at a total cost of \$4,500, for the raising of which provision was therein made. This by-law being approved of by the votes of the electors, was duly passed by the council on 5th May, 1885.

In anticipation of this result tenders had been invited by the council, and that of one Burgess for doing all the carpenter work, painting, glazing, and eave-troughing, (including a wooden shingle roof to be laid in mortar) at the price of \$2,408, was accepted.

On May 15th the whole council was constituted a building committee with reference to this work. Some of the councillors seeing a metallic roof in the village thought it better to have such a roof for the new hall; and as the outcome of this, a special meeting was held on the 23rd September, at which three of the councillors were present. It is said that this meeting was called at the instance of the reeve, but this is denied. It appears, however, that other general business was done on that occasion, and other meetings of a like kind appear in the minute book of the council. Any irregularity in calling the meeting has been waived by the adoption and recognition by the council of what was done there, and cannot affect the rights of the plaintiff, if he is otherwise entitled to recover. At this meeting there were present a quorum of the council, also Burgess, and Lawrence the plaintiff. The matter of the change of roof was then discussed in open council, and Burgess agreed to throw off \$4 per square, and get rid of the roof part of his contract, while Lawrence agreed to put on the metallic roof at \$6 per square. It was then calculated that the extra expense would be about \$110 in excess of the original contract price; which is, in point of fact, almost correct. It was then resolved by the council that, "the iron shingles instead of wooden shingles be put on the roof of the new town hall."

This action of the council was, however to be subject to the approval of the reeve, Campbell. He was soon after seen by the councillors, as well as by Burgess and Lawrence, and gave his approval, whereupon Lawrence at his instance, ordered the material, began the work, and had it completed by the end of November. It was agreed with the council that the plaintiff should not then do the painting (which

would cost about \$6) till the following spring. It is plain, I think, that the legal effect of this transaction was to consummate a tripartite agreement, by which Burgess was to give up his right to do and be paid for the wooden roof, and Lawrence was to do the work of metallic roofing for the corporation at the price specified.

This disposes of the main difficulty raised by the council upon the facts. The present reeve, Tennant, in his evidence states the position of the defendants thus: "We refuse to pay Lawrence because we hold we have no contract with him; he is but a sub-contractor under Burgess, and we will not pay Burgess because the roof is bad and leaky. Therefore we will not pay anybody; but we are prepared to pay on getting the roof fixed, so as to be a good roof." Between the plaintiff and defendants and Burgess there was a novation of contract so far as the roof was concerned, and as to that, Lawrence became the principal and only contractor: *Wilson v. Coupland*, 5 B. & Ald. 228; *Scarf v. Jardine*, 7 App. Cas. 351.

After the substantial completion of the contract by the plaintiff there was a dealing between him and the corporation, by which they recognized his relationship to them and admitted their liability to pay for the work. He applied for payment of \$100 on account by written request (and perhaps by sending in therewith his account), which being laid before the council, resulted in a vote on 10th December, 1885, that "Thos. Lawrence be advanced \$100 on work on hall." He received a cheque therefor, dated 17th December, which is expressed to be "for part payment of roof on hall," and is signed by the reeve (Campbell) and by the clerk of the council. On the 18th December the Council held its last meeting for that year, at which the reeve and councillor McCuaig (who had been absent before) were present, and the minutes of the meeting of 10th December were read and confirmed. That committed the council fully and every member of it to a recognition of Lawrence's right to be paid as their contractor, irrespective of the merits or demerits of Burgess's work. At that meeting,

however, the council did take the position later on when the whole account of Lawrence was brought before it, that he could only be paid through Burgess, by directing that his roofing account should be drawn through Mr. Burgess. But that *ex parte* action cannot affect the plaintiff, nor invalidate the agreement between all the parties previously concluded.

The plaintiff's account was sent in to the new council in February, 1886, but they laid it over and recommended no payment because, as the new reeve, Dr. Tennant, says, he could find no contract with Lawrence.

In February or March the council found out that the roof leaked, and this they now put forward as the next objection, on the facts, in excuse of their non-payment. The evidence was fully gone into on this head in order to determine their right to damages, and after much conflict of testimony the Judge has held against the defendants, and it is conceded that this finding cannot be disturbed as it is supported by ample evidence. Upon the facts, therefore, the conclusion is reached that the plaintiff is the contractor and has done his work satisfactorily, and that there is no reason why, notwithstanding its alleged defects, it should not be paid for in full.

After the council found out the leakage, (which it must now be taken results from the improper construction of the building apart from the metallic roof), they got possession for the purpose of housing the fire engine; they also insured the building for \$3,000, and appointed a caretaker. In June it was first occupied for the council meetings and has been so used ever since. It has also served for other municipal purposes—for Division Courts and Magistrates' Courts, and also for a public meeting of the ratepayers. It was in June (whether before or after the first meeting in the new building does not appear) that the reeve and two at least of the councillors inspected the roof, in company with Burgess and the plaintiff. There appears to be substantial concord in the evidence as to what then occurred. The leaks were discovered to be at

the tower, (therefore, upon the finding, not attributable to the plaintiff's work) and Dr. Tennant says, with the exception of the tower, the leaks did not amount to much. They all came to the conclusion that a little plastering round the tower would protect the roof, and this was ordered to be done as an extra, and was done by the plaintiff, and paid for by the corporation. Burgess says Lawrence had nothing to do with the defects pointed out, and all agree that the reeve said when this was repaired that Lawrence had better send in his account, and he did not think there would be any trouble in settling it. It was about this time in June that the roof was painted by the plaintiff, and he then sent in his final and corrected account, there being an error before as to the accurate dimensions of the roof.

This account was, however, laid over by the council, and the plaintiff issued his writ on the 22nd July, which was served on 3rd August, whereupon the council resolved to defend the action on the ground that "not knowing Lawrence as a contractor they refuse payment of his account."

It is urged that the facts do not indicate an acceptance of the contract by the corporation, because according to the doctrine of *Munro v. Butt*, 8 E. & B 738, the building being on their own land they had the right to its possession, and their taking possession is no evidence of approval of the work. I can hardly regard that case as in point. There being a special contract which was not completed, the question in *Munro v. Butt*, was, whether the taking possession was *per se* evidence of a waiver of the special terms of the contract or of a new agreement to pay for what was done upon a *quantum meruit*. Here the contract has been completed and that in a proper and workmanlike manner, so that it is the duty of the council to accept it, and no excuse can be alleged for non-acceptance because of its imperfections. Apart from the mere taking possession, also, we have evidence of other acts indicating acceptance, such as the payment of part of the price, and

the inspection by a majority of the council and satisfaction expressed so far as the plaintiff's work was concerned. There is sufficient evidence to justify a finding that the possession and user in this case amounts to an acceptance of the work as an executed contract. It is thus brought down to a case "of an actual and *de facto* performance of the contract by one party, of which the other party has taken, received and enjoyed the benefit," as is said by Kelly, C. B., in *The Mayor of Kidderminster v. Hardwick*, L. R. 9 Ex. 18. See also *Hamilton v. Myles*, 24 C. P. 309; *Peacock v. Harris*, 10 East. 104; *Waters v. Tompkins*, 2 C. M. & R. p. 726, Parke, B.

But it is urged that there is no contract under seal, and therefore no right to sue. It is still, in my opinion, law in this country that a municipal corporation is liable on an executed contract for work done by its order, on its behalf and for its benefit, though there be no agreement under seal, if the thing done was urgently required for the purposes of the corporation, and especially so where the price to be paid is not of large amount. *Nicholson v. The Guardians of the Bradford Union*, L. R. 1 Q. B. 620, places the law in that position in England, notwithstanding prior conflicting decisions. The cases are reviewed by Lord Blackburn in *Young v. Leamington*, 8 App. Cas. 515, *apropos* of municipal corporations, and he agrees with the view of Lindley, L. J., in S. C. 8 Q. B. D. 585, that the cases are numerous and conflicting, and that they require revised and authoritative exposition by a Court of Appeal.

The limited liability of a municipal corporation on an executed contract not under seal, is recognized by Bramwell, L. J., in *Hunt v. The Wimbledon Local Board*, 4 C. P. D. 53, though it is viewed with suspicion, if not doubt, by Brett and Cotton, L. JJ. in that case, and in the latest case of *Young v. Leamington*, in the House of Lords, it is declared not to be needful to decide this point. The authorities for and against such liability are marshalled by Lindley, L. J., *Hunt v. Wimbledon*, 3 C. P. D. p. 214. I may observe that the latest case cited by him against the liability :

Crampton v. Varna R. W. Co., L. R. 7, Ch. 562, is not so, absolutely, as will appear from the judgment of Mr. Justice Gwynne, in *The Canada Central R. W. Co. v. Murray*, 8 S. C. R. 312, 333.

The law, as I have stated it, is laid down to the same effect, substantially, in the latest Ontario case of *Robins v. Brockton*, 7 O. R. 481, (Jan. 1885), and the opinions expressed by Mathew, J., in the latest English case are in accord therewith. I refer to *Scott v. The Clifton School Board*, 14 Q. B. D. 500, (Dec. 1884,) where he is thus reported: "If it were necessary for my decision, I should hesitate to regard the cases relied upon by the defendants, where contracts by corporate bodies were held to require to be under the common seal, to be a safe guide in the present case, (or indeed in any other case), where the contract was for a purpose incidental to the performance of the duties of the corporate body, and its necessity was shewn by proof that the corporation, with full knowledge of its terms and of all the facts, had acted upon and taken the benefit of its performance," p. 503. In that case, (very much as in the present, and in the case in 7 O. R.,) the orders given the plaintiff were agreed to by resolution of the board, and were duly recorded in the minutes.

It appears to me that all the conditions concur to fix the defendants with liability in this case. The ratepayers and council agree by the very terms of the by-law, that the work was of "urgent necessity;" having the walls of the building up, it became necessary to proceed with the roof. It was not a mere matter of convenience to further prosecute the work at that point. The execution of the whole was sanctioned by the by-law. The extra expense involved in this change was of trifling amount, \$108 in all. The work has been done satisfactorily (as found by the Judge) and having been paid for in part, has been entered upon and enjoyed by the corporation.

The only other matter argued before us was that there was no money available for the payment of the plaintiff.

all the funds derived from the sale of debentures under the by-law having been exhausted. That is a defence not raised on the pleadings, and not seriously entertained by the defendants. Taking the reeve's own figures as given in the evidence, there is only \$200 to be raised to pay off the entire contract price, and extras and land. The proceeds of the original debentures were about enough to pay for the land and the original contract price :

Thomas Burgess's contract	\$2,408
McGregor's "	2,040
	4,448
Land	200
	\$4,648

The debentures were sold at a premium and realized \$4,635. It is to be noted, however, that the council received a county grant of \$200 towards the town hall, on the 8th June, 1886, as appear by their minutes, which is still in their hands unexpended. So that having paid \$600, as Campbell says, on the extras, which are in all \$800, it is the fact that the council are in funds to meet the plaintiff's judgment for \$231.20, as found by O'Connor, J.

But upon the detailed figures proved, the result stands thus :

Paid out by corporation to Burgess and plff	\$2,338
" " " McGregor, ...	2,397
For land	200
	\$4,935
Received Debentures	\$4,635
County grant	200
Rate collected in 1885	400
	\$5,235
	4,935
Balance in hand	\$ 300

Even if this defence had been set up and proved, I am not sure that it would affect the right to judgment; but this line of inquiry it is needless further to pursue. See *The Corporation of Frontenac v. The Corporation of Kingston*, 30 U. C. R. 584, 595; *The Corporation of Wentworth v. The Corporation of Hamilton*, 34 U. C. R. 602, and *Armstrong v. The Corporation of West Garafraxa*, 44 U. C. R. 515.

The judgment should be affirmed, with costs.

PROUDFOOT, J., concurred.

G. A. B.

[CHANCERY DIVISION.]

WELLS v. LINDOP.

Slander—Denial of, by pleading—Evidence of privileged occasion—Amendment.

W. was in the employ of a mining Co. of which L. was president, and had been working in the mining district under an arrangement by which his wife was to draw half his wages at the head quarters of the company (her home). After he ceased to be employed by the company, but while still in the mining district and before he was settled with and his wages paid up, his wife with a companion went to L. to apply for some of her husband's wages, and he replied, "We don't owe him anything now, he stole the boat, the cooking stove, and a lot of other things and sold them." The secretary of the company had previously received a letter stating that the plaintiff had done what the defendant said he had. The defendant by his statement of defence denied using the words, and gave evidence to that effect at the trial, but proposed also to give evidence that whatever the words used were, he honestly believed them to be true, and leave was asked to amend by setting this up. The Judge who tried the case, held that the occasion was not privileged, and refused to allow the amendment, and on a motion for a new trial. It was *Held*, (reversing the judgment of O'Connor, J.,) that the occasion was privileged, and a new trial was granted to give the plaintiff an opportunity to prove malice.

THIS was an action of slander brought by William W. Wells against Henry Lindop which was tried at St. Thomas on September 11th, 1886, before O'Connor, J., and a jury.

D. J. Donohue, for the plaintiff.

John Farley, and *T. W. Crothers* for the defendant.

It appeared that the plaintiff was in the employ of the Elgin Silver Mining Co., of which the defendant was the president, and had been sent away to work at the mines in the District of Algoma. Under an arrangement, the plaintiff's wife was to draw half of his wages while he was away. After he ceased to be employed by the company, but before he was settled with and paid up, she went with a friend to apply for some money, and met the defendant in the public street in the city of St. Thomas, and in answer to her application he said "We don't owe him anything now; he stole the boat and a cooking stove, and a lot of other things, and sold them." This was the slander alleged. The secretary of the company had previously received a letter stating that the plaintiff had done what the defendant said he had.

The defendant, in his statement of defence, denied using the words; and at the trial, although he did the same in his evidence, he attempted also to shew that whatever the words used were he honestly believed them to be true, and contended that the occasion was privileged, and leave to amend by setting it up was asked.

The learned Judge ruled against this, and refused to allow the amendment. The jury brought in a verdict of \$400 for the plaintiff.

At the following Sittings of the Divisional Court the defendant moved to have this verdict set aside, or for leave to enter a non-suit, or for a new trial; and the motion was argued on December 8th, 1886, before Boyd, C., and Proudfoot, J.

Aylesworth, for the motion. The case should not have been allowed to go to the jury. The words were privileged, and the occasion was privileged. No malice was shewn. The party uttering the alleged slander and the party to whom it was uttered had a common interest. The defen-

dant had a right to give a reason why no wages were due : *Hobbs v. Bryers*, L. R. Ir. 2 C. L. 496 ; *Odger's Law of Libel* 234 *et seq.* ; *Folkard's Law of Libel and Slander*, 4th ed., 256 *et seq.* ; *Coxhead v. Richards*, 2 C. B. 569 ; *Bennett v. Deacon*, 2 C. B. 628 ; *Somerville v. Hawkins*, 10 C. B. 583 ; *Manby v. Witt*, 18 C. B. 544 ; *Padmore v. Lawrence*, 11 A. & E. 380 ; *Hamon v. Falle*, 4 App. Cas. 247. *Toogood v. Spyring*, 1 C. M. & R. 181, A third person being accidentally present does not alter the privilege. Here the plaintiff's wife sought out the defendant, and brought her companion. It might be different if the defendant sought her out and carelessly spoke the words : *Howe v. Jones*, Times L. R. (1884 and 1885) vol. 1, p. 461, May 8th. 1885. The learned Judge was wrong in telling the jury that there was no privilege unless it was pleaded : *Blagden v. Bennett*, 9 O. R. 593.

D. J. Donohue, contra, The Judge's ruling and charge were proper. The defendant could have no privilege under the circumstances. The words used were very strong. The relation of master and servant had ceased to exist. Even where a party considers himself under an obligation to communicate such information he must do it as quietly and considerately as possible : *Odger* 161-165. The evidence shews that the tone, demeanour, and words in this case all exceeded the occasion. Privilege here would virtually be a justification. The evidence also shews that when the words were used the defendant did not believe the facts mentioned.

Aylesworth, in reply. If necessary, I ask for leave to amend by setting up privilege on the pleadings. I refer, also, to *Wilson v. Woods*, 9 O. R. 687 ; *Moore v. Mitchell*, 11 O. R. 21.

January 8, 1887. PROUDFOOT, J.—This is an action for slander. The plaintiff had been employed by the defendants to work as a miner. The defendants had lost by stealth some goods. They had received a letter from a person saying that the plaintiff had stolen a boat, a cook-

ing stove, and a lot of other things, and had sold them. On the 30th October, 1884, the plaintiff's wife applied to Lindop, the president of the defendants' mining company, for payment of wages owing to the plaintiff. She took with her a companion, Mrs. Annie Sarsfield. Lindop at the time was engaged at the new post office in St. Thomas, and the application was made to him on the street near that building. In answer to the application he said: "We don't owe him anything now; he has stole the boat, the cooking stove, and a lot of other things, and sold them." Mrs. Sarsfield heard the words. It is said that others employed about the building or passing by on the street could hear these words. There is no evidence that they did hear them. Mrs. Wells was asked, "Did he speak low or high?" and she answered, "Forced it right out of him as though he was going to knock me down. I felt like it. I felt like fainting at the time."

There was an understanding between Wells and the defendant's company that his wife was to have half of his wages while he was away.

It was contended by the defendant that the communication was privileged, and leave was asked to amend the record by pleading it, if necessary to do so.

As to the latter point, the case of *Blagden v. Bennett*, 9 O. R. 593, 601, appears to establish that if the plaintiff, in his endeavour to make out his case, discloses in his evidence that the occasion was privileged, there is no need for the defendant to plead the privilege; and that is the case here. All the facts upon which the privilege is claimed were extracted from the plaintiff's witnesses.

But the question remains whether the occasion was privileged. The learned Judge held that it was not privileged, and under his direction the jury found a verdict for the plaintiff.

A new trial is now moved for, because the communication was a privileged one.

Many of the cases are collected in *Holliday v. The Ontario Farmers' Mutual Ins. Co.*, 1 A. R. 483, 499; and

the rule as laid down in *Toogood v. Spyring*, 1 C. M. & R. 181, by Parke, B., is referred to as correctly embodying the rule of law. An attentive consideration of the circumstances in that case, and the law applied to them, will go far to determine how the law is to be applied in the present.

The plaintiff in that case was a journeyman carpenter, and had been in the employ of Brinsden, a master carpenter. The defendant resided on a farm. Brinsden sent the plaintiff to do some work required to be done by the defendant. The work was done in a negligent manner, and not to the satisfaction of the defendant. During the progress of the work the plaintiff got drunk, and circumstances occurred which induced the defendant to believe that the plaintiff had broken open the cellar door and obtained access to his cider. Two days after, while the plaintiff and one Taylor were at work, the defendant came to them and, addressing the plaintiff, spoke the following words: "What a d——d pretty piece of work you did at my house the other day." The plaintiff said, "What, sir?" The defendant replied, "You broke open my cellar door, and got drunk, and spoiled the job you were about." The plaintiff denied the charge; but the defendant said he would swear to it, and so would his three men. On a subsequent occasion, when the plaintiff was not present, in answer to a question put to him by Taylor whether he really thought the plaintiff had broken the cellar door, the defendant said, "I am sure he did it, and my people will swear to it." On the same day the defendant saw Brinsden and told him that Toogood had spoiled the door, and that the cellar had been broken open, and that Toogood had got drunk; he said he considered it had been done with a chisel, and that Toogood did it because of the getting drunk.

Parke, B., in giving judgment says, that the communication to Brinsden was protected, and the statement made to the plaintiff, though in the presence of Taylor, was also protected; but the statement to Taylor, when the plaintiff was not present, was not protected. And at p. 193: "In general, an action lies for the malicious publication of state-

ments which are false in fact, and injurious to the character of another (within the well known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned."

In the present case, assuming that the words were spoken, which the jury have found, though denied by the defendant; they were not volunteered by the defendant, they were used in answer to a request for money: they were used by the defendant in the conduct of his own affairs: in matters where his interest was concerned: and made to a person, the plaintiff's wife, who may be considered as representing the plaintiff, and who by an arrangement made by the plaintiff with the defendants was entitled to receive a portion of the wages. The defendant did not seek for an opportunity of making the charge either to the plaintiff's wife, or to her in the presence of Mrs. Sarsfield. And as said by Parke, B., in *Toogood v. Spyring*, at p. 194, "The mere fact of a third person being present does not render the communication absolutely unauthorized; though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bonâ fide* in making the charge, or been influenced by malicious motives." There is no evidence that any one else than Mrs. Sarsfield heard what was said to the plaintiff's wife.

I find it very difficult to distinguish *Toogood v. Spyring* from this case in a manner favorable to the plaintiff. The facts in the present case are much more favorable to the claim of privilege than in that. There the defendant sought the plaintiff to make the charge against him, and sought Brinsden, the plaintiff's employer, to repeat it; while here the defendant does and says nothing till applied to for money, and the place was not of his seeking.

The learned Judge charged the jury that the language was not privileged.

The numerous cases referred to in *Holliday's Case, supra*, recognized the rule in *Toogood v. Spyring*; the only difficulty experienced was in the application of it. I have not thought it necessary to go over them as was done by Patterson, J. A., in the Court of Appeal, since I think the case of *Toogood v. Spyring*, acknowledged in them all to be sound law, justifies the conclusion that the language in the present case was privileged.

There should be a new trial, so that the plaintiff may have an opportunity of proving express malice, if able.

BOYD, C.—It is my opinion that this case has not been satisfactorily tried, and that the application for a new trial should be granted. The difficulties have arisen from the state of the pleadings and the inapplicability of much of the evidence to those pleadings. The defence put upon the record was simply a denial of having uttered the defamatory words, and it appears to have been an after-thought arising at some period during the trial, to place the defence on the footing of privilege. The Judge ruled that the occasion was not privileged, chiefly (as I understand the proceedings at the trial) because that was not the ground on which the defendant placed himself by his defence; but if the evidence as given to some extent at large is regarded, I think the better conclusion is, that the occasion was one of qualified privilege. If *Blagden v. Bennett*, 9 O. R. 593, is to be taken as laying down as a general proposition that the omission to plead privilege does not preclude a defendant from setting it up, without amending the record, at the trial, I am not prepared to adopt that view of the law.

Under the old system of pleading in actions of slander, the defendant under "not guilty," might go into evidence to shew that the words were not spoken in the malicious sense imputed, but in an innocent sense, or upon an occasion which warranted their utterance: *Kegan v. Robson*, 6 U. C. R. 375. But the defendant under that system had the option of pleading these same matters by way of con-

fessing the utterance, and shewing that in the circumstances it was not actionable. Such a plea was required not only to deny malice, but to shew that the words were used honestly and *bona fide*, with the belief that they were true: *Smith v. Thomas*, 2 B. N. C. 372; *Hoare v. Silverlock*, 9 C. B. 23.

It is not needful now to discuss the question whether "not guilty," is a proper plea since the Judicature Act by virtue of the special act as to libel and slander in the Revised Statutes of Ontario; and if so, what may now be its precise defensive scope, because that plea is not upon this record. The only defence is, that the defendant did not use the words in the sense imputed, or in any sense whatever, *i. e.*, really neither more nor less than a denial *in toto* of their utterance. A denial that the defendant did not use the words in the sense imputed, would have been a bad plea in this case, because the defamatory words were *per se* actionable, and impute an indictable offence. Such a plea should have gone further and alleged that the words were used in some other sense not actionable, which could not have been done here: *Watkin v. Hall*, L. R. 3 Q. B. 398. The last clause of the defence was added to make a good plea, and that only put in issue the utterance of the words. Upon proof of that the plaintiff was entitled to succeed without more, and it was not, in my opinion, competent for the defendant to cross-examine with a view to establish any privilege on such a record. The Judge, if the objection had been made, should have ruled out such a line of investigation because it was not in issue, as the defendant had not placed his defence on the ground of privilege: *Scott v. Sampson*, 8 Q. B. D. 491; *Bell v. Parke*, 11 Ir. C. L. Rep. 413 (1860). The whole conduct of the case and the burden of proof must be changed by the introduction of the element of the occasion being a privileged one, and it rests upon the defendant to state this as his defence if he wishes to rely on it, even in cross-examination of the plaintiff's witnesses. On the present pleadings it is not necessary for the plaintiff to

allege or prove malice; that element will be implied upon proof of the words themselves: *Bromage v. Prosser*, 4 B. & C. 255; *McPherson v. Daniels*, 10 *ib.* 272; *Clark v. Molyneux*, 3 Q. B. D. 247; *Belt v. Lawes*, 51 L. J. Q. B. 359. But if privilege is pleaded and proved, that will render it essential for the plaintiff to establish malice as a matter of fact to save him from being non-suited: *Somerville v. Hawkins*, 10 C. B. 583.

The English cases since the Judicature Act shew that privilege must be specially pleaded. It is said in *Odger's Law of Libel and Slander*, p. 484, that such was the decision in the Exchequer Division in a case not reported: *Spackman v. Gibney*, and that there is a similar decision in Ireland: *Simwonds v. Dunne*, Ir. R. 5 C. L. 358. Since the publication of this text-book there is the case of *Belt v. Lawes*: 51 L. J. Q. B. 359, in the same direction. See also *Macdonell v. Robinson*, 8 O. R. 53, and in appeal 12 A. R. 270. It appears to me to be essential for the defendant to place this defence upon the record to entitle him in any manner to rely upon privilege at the trial.

So far as the merits are concerned the defendant may be exempt from liability on the ground of privilege. The principle on which the doctrine of privileged communications or occasions rests, is well and succinctly defined by Lord Denman, in *Tuson v. Evans*, 12 A. & E. 733, 736, in these words: "Any one, in the transaction of business with another, has a right to use language *bonâ fide*, which is relevant to that business, and which a due regard to his own interest makes necessary; even if it should directly, or by its consequences, be injurious or painful to another."

The plaintiff's wife, acting rightly as his agent, with a companion, sought out the defendant in order to transact business with him—the business being to demand the payment of wages, owing as alleged by the company of which the defendant was President, to the plaintiff for services rendered before his discharge from the company's service. The defendant objected to pay

and gave as grounds of that objection that he had been informed that the plaintiff had stolen and disposed of the company's property—so that he had thus in fact paid himself. It appears to me that all the necessary ingredients of privilege are found in this interview, the substance of which I have summarized.

Notwithstanding the question of such privilege the defendant may be liable on proof of matters from which actual malice may be fairly deduced, such as if he had not an honest belief in the report he promulgated: *Fountain v. Boodle*, 3 Q. B. 5: or if his mode and style of utterance were more injurious than was requisite: or by the exhibition of unwholesome virulence or exaggeration or the like. As pithily put in a late case, *Jones v. Thomas*, 34 W. R. 104, the extent of the privilege can only be commensurate with the propriety of fitness of the occasion on which the communication was made. These matters, however, are all for the consideration of the jury, if it is so presented in the pleadings and proofs that the Judge is justified in holding that the occasion was one of privilege, having regard to the business which was being transacted.

For these reasons I agree in the result at which my brother has arrived that there should be a new trial, and and for this purpose the verdict and judgment will be set aside.

G. A. B.

[CHANCERY DIVISION.]

BAIN, V. MALCOLM ET AL.

Will—Agreement giving effect to unexecuted will—Deficient estate—Debt due from legatee to testator—Retention by executor—R. S. O. ch. 107, sec. 30—13 Eliz. ch. 5.

I. R. endorsed notes for the accommodation of J. R. The holders received out of the estate of J. R. after his death 60 cents in the dollar, leaving \$3,500 unpaid. B. the executor of I. R. paid this. I. R. who died January 1st, 1884, left all the residue of her estate, real and personal, to be equally divided, share and share alike, between J. R., J. F., and J. B. Shortly before her death I. R. had another will prepared, but died without executing it. There was a residuary clause in this latter will of all her property, directing a division of it into four equal parts, one share of which was to be given to J. R. On January 4th, 1884, all persons interested in the residuary devised in the will and in the intended will signed a written agreement on the back of the latter, that they accepted the distribution of the estate of I. R. provided for in the latter, in lieu of that contained in any other will though duly executed. By his own will, executed on February 13th, 1884, J. R. directed that the estate of I. R. so far as he was interested therein should be divided according to the agreement signed by him on January 4th, 1884.

Held, (i) that B., the executor of I. R., had the right to pay or retain out of J. R.'s share of her residuary estate the full balance which he had been obliged to pay on said accommodation notes, although J. R.'s estate was insolvent, and although the accommodation paper in question fell due after I. R.'s death.

R. S. O. ch. 107, sec. 30, abolishing the right of retainer in case of a deficiency of assets, has reference to the debtor's estate, not to the creditor's, and where a legatee is indebted to the testator, the executor may retain the legacy either in part or full satisfaction of the debt by way of set-off, and this is not affected by that statute.

(ii.) The agreement of January 4th, 1884, was binding on J. R. and was binding on his executor and could not be impeached by his creditors.

The only possible ground of complaint by creditors was that this agreement violated 13 Eliz. ch. 5, but that statute is directed against fraudulent alienations of property, whereby the debtor diminishes the estate, and does not touch the case of his neglecting or refusing to enrich himself.

THIS was a special case stated for the opinion of the Court upon certain questions arising out of the administration of the estates of James Reid and Isabella Reid, deceased. The facts are fully set out in the judgment.

The matter came on for argument on December 15th, 1886, before Proudfoot, J.

Bruce, Q.C., for the plaintiff. As to R. S. O. ch. 107, sec. 30, there is nothing there to prejudice any lien. It does not apply to Miss Reid's estate, which is solvent. The Imp. Act 32-33 Vic. ch. 46 only swept away the distinction between simple contract and specialty creditors. The question is, whether Miss Reid's executor, having paid the notes, may deduct the amount from James Reid's share of her estate. I refer to *In re Williams*, *Williams v. Williams*, L. R. 15 Eq. 270; *In re Stubbs's Estate*, *Hanson v. Stubbs*, 8 Ch. D. 154; *Will. on Exec.*, 8th ed., pp. 1043, 1309; *Jeffer v. Wood*, 2 P. Wms. 128; *Stammers v. Elliott*, L. R. 4 Eq. 675, S. C. L. R. 3 Ch. 95; *In re Orpen*, *Beswick v. Orpen*, 16 Ch. D. 202; *Cherry v. Boulton*, 4 M. & Cr. 442; *Smith v. Smith*, 3 Giff. 263; *Courtenay v. Williams*, 3 Ha. 539, S. C. 15 L. J. N. S. Ch. 204; *In re Cordwell's Estate*, *White v. Cordwell*, L. R. 20 Eq. 644. James Reid might have renounced the bequest or devise, and therefore he might take less. The costs should be out of James Reid's estate.

Kittson, for the defendants. All the cases cited can be distinguished in that an actual debt existed between the parties at the death of the testator. The question must be dealt with as at the death of James Reid, and at that time the notes had not been paid by Miss Reid's estate. There is no right to retainer by Miss Reid's executors. As to the agreement as to the unexecuted will, this is only a voluntary matter. I refer to *Bank of British North America v. Mallory*, 17 Gr. 102; *Taylor v. Brodie*, 21 Gr. 607; *Chamberlen v. Clark*, 1 O. R. 135, 9 A. R. 273; *Willis v. Willis*, 20 Gr. 396; *Re Ross*, 29 Gr. 385; *Newell v. National Provincial Bank of England*, 1 C. P. D. 496; *Watson v. Mid-Wales R. W. Co.*, L. R. 2 C. P. 593; *In re Paraguassu Steam Tramroad Co.*, L. R. 8 Ch. 254; *In re Gillespie*, *Ex parte Reid & Sons*, 14 Q. B. D. 963.

Bruce in reply cited *Boyd v. Brooks*, 34 Bea. 7, S. C. 34 L. J. Ch. 605.

January 8th, 1887. PROUDFOOT, J.—The plaintiff is the executor of Isabella Reid, the defendants are the executor, Malcolm, of James Reid, and the legatees under the will of Isabella Reid.

James Reid was a merchant, and his sister Isabella Reid endorsed notes for his accommodation to a considerable amount.

Upon the death of James Reid it was ascertained that his estate would not pay his liabilities in full. Out of his estate the holders of these accommodation notes have received 60 cents in the dollar, which left \$3,500 unpaid, and which the plaintiff has paid.

Isabella Reid died on the 1st of January, 1884, having made a will in 1876, by which, after providing for payment of her debts and making certain specific bequests, she made a bequest in the following terms:

"I give and bequeath all the residue and remainder of my estate real and personal that I may be possessed of or entitled to at my decease, and which I authorize my executors hereinafter named to sell, dispose of, and convey as they may think best, the proceeds arising therefrom to be equally divided, share and share alike, between my brother James Reid and my sisters Janet Folsetter and Jean Bain."

Shortly before the death of Isabella Reid she had another will prepared for execution, but died without executing it. In this unexecuted will the residuary devise was as follows: "I give and bequeath all the residue of my estate real and personal that I may be possessed of or entitled to at my decease, and which I authorize my executors hereinafter named to sell, dispose of and convey as they may think best, the proceeds thereof to be divided into four equal parts or shares and disposed of as follows: One share to be given to my brother James Reid." The other dispositions are not material.

On the 4th of January, 1884, all the persons interested under the residuary devises in the will, and in the intended will, signed an agreement on the back of the intended will in the following terms: "It is mutually agreed by the

undersigned heirs of Miss Isabella Reid, herein mentioned, that they accept the distribution of her estate herein provided in lieu of any other will or testament that may be in existence, although duly executed by her."

By the will James Reid would have been entitled to one-third of the residue, while by the agreement he accepts one-fourth only.

And James Reid, by his will, executed on the 13th of February, 1884, directed "that the estate of my sister Isabella so far as I am interested therein, be dealt with and divided according to a memorandum signed by me and the other parties interested on the day of the funeral." That is the 4th of January, 1884.

The questions submitted for the opinion of the Court are:

1. Whether the plaintiff is entitled to pay the amount he has been so obliged to pay upon accommodation paper out of the legacy payable to Malcolm as executor of James Reid under the residuary clause of the will of Isabella Reid, and to pay only the balance of the said legacy to Malcolm; or whether Malcolm is entitled as executor of James Reid to receive payment in full of the said legacy, leaving the plaintiff to rank only with the other creditors of the estate of James Reid in respect of the amount so paid upon accommodation paper.

2. Whether the agreement of the 4th of January, 1884, is binding on the executor of James Reid and the other parties thereto or not.

The estate of Isabella Reid is of considerable amount, and the shares of the residuary legatees are also considerable.

If this were simply a question of retainer, the R. S. O. ch. 107, sec. 30, would prevent the assertion of the right to the prejudice of the other creditors of James Reid. In the case of a deficiency of assets the statute abolishes the right of retainer, and places debts by specialty and simple contract upon an equal footing. The deficiency of assets must refer, however, to the debtor's estate, and not, as was argued, to the estate of the creditor.

But this is not altogether correctly termed retainer: it is rather a right to pay out of a fund in hand than a right of set-off or retainer. And such right of payment can only arise where there is a right to receive the debt so to be paid; and the legacy or fund so to be applied in payment of the debt must be payable by the person entitled to receive the debt: *Cherry v. Boulbee*, 2 Keen 319, 4 M. & C. 442, 447. Or as stated in 2 *Will.* on Executors, 8th ed., p. 1310, where a legatee is indebted to the testator, the executor may retain the legacy either in part or full satisfaction of the debt by way of set-off, and see the cases there cited. And this is not affected by the statute abolishing the distinction between specialty and simple contract debts.

I need not refer to the cases decided under the bankrupt laws, as there is no bankruptcy in the present case, and James Reid's estate is being administered by his executor.

It appears that all the accommodation paper now in question fell due after the death of Isabella Reid, and it is argued that the question must be determined upon the matters as they stood at her death. *In re Gillespie, Ex parte Reid & Sons*, 14 Q. B. D. 963, to which I was referred, turned upon the provisions in the Bankrupt law as to set off, and it was held that where there are mutual dealings between a debtor and his creditors the line as to set-off must as a general rule, and in the absence of special circumstances, be drawn at the commencement of the bankruptcy. But that has nothing to do with the present case; here there is no bankruptcy, and what is sought is not strictly set-off. *Newell v. The National Provincial Bank of England*, 1 C. P. D. 496, shews that the statute as to set-off does not apply where an administrator sues for a debt due to the intestate, and a debt is due from the intestate but which did not become payable till after his death. *Watson v. The Mid-Wales R. W. Co.*, L. R. 2 C. P. 593, decided that when an equitable chose in action has been assigned, the debtor cannot set-off against the assignee a debt which has ac-

crued due to him from the assignor since the notice of assignment, though resulting from a contract entered into previously, unless from the nature of the transaction it appears to have been intended between the original parties that the one should be set-off against the other. These two cases apply to what is strictly called set-off, but do not govern cases like the present.

In *Boyd v. Brooks*, 34 Beav. 7, an executor being surety for his testator paid the debt after the testator's death, and it was held that he had a right to retain his debt in preference to the other creditors of equal degree. That is not the same case as this, but the principle of it is applicable to this.

As to the second question, I have no doubt that the agreement of the 4th of January was binding upon James Reid, and is binding upon his executor, and cannot be impeached by his creditors. It was not without consideration, for the other parties who took an interest under the will united with him in surrendering a portion of their interest; it is like an agreement among creditors to accept a composition, where every signature is a consideration for the others. If binding upon James Reid it would, without more, bind his executor. But there is something more in this case; for James Reid by his will declared that his interest in Isabella Reid's estate should be regulated by the agreement of the 4th of January, and the executor has proved the will and undertaken to administer the estate according to its provisions; it is impossible for him then to claim a greater interest than the agreement warrants.

But the executor of James Reid claims on behalf of the creditors of James Reid that the agreement does not bind them. Assuming that in this proceeding any such claim can be made for the benefit of persons not parties to the action, I think the agreement cannot be impeached by them. The only possible ground of complaint is that it violates the Statute of 13 Eliz. as a fraud upon the creditors. But that statute is directed against fraudulent alienations of property, whereby the debtor diminishes his estate, and does not touch the case of his neglecting or

refusing to enrich himself. It is true that the legacy gives a right of property or of credit from the day of its acceptance; but this acquisition is not perfect, it only becomes definite by the will of the legatee. A donation is offered to me and I refuse it; an inheritance is offered to me and I repudiate it; property is given to me under a condition that depends upon myself to fulfil, and I do not perform it. In all these cases my creditors have nothing of which to complain, because my patrimony remains exactly what it was before. In *May* on Voluntary and Fraudulent Alienations, &c., p. 6, it is said that the Statute of Elizabeth is only in affirmation of the doctrines of the Common Law, and coincides with the provisions of the Civil Law. The title in the Digest, *Quae in fraudem creditorum facta sunt, ut restituantur* (42, 9), is a commentary on the Praetor's edict avoiding acts *quae fraudationis causa gesta erunt*. The 6th fragment states that the edict applies to those who diminish their property, not to those who do not seek to enrich themselves; hence if a debtor has been promised something under a condition which he does not comply with, intending to render the promise ineffectual, the edict does not apply; so, also, if he repudiate an inheritance or a devise; and in like manner if he repudiate a legacy the edict is not violated.

Pertinet enim edictum ad deminuentes patrimonium suum, non ad eos qui id agunt, ne locupletentur. * * Qui repudiavit hereditatem, vel legitimam, vel testamentariam, non est in ea causa, ut huic edicto locum faciat: noluit enim adquirere, non suum proprium patrimonium deminuit * * Si legatum repudiavit, cessare edictum.

Similar provisions are found in D. 49, 14, 26, and in D. 50, 17, 134.

According to these principles James Reid might have declined to accept the whole of the legacy, and so might decline to accept a part, without contravening the 13th Eliz. See, also, *Re Dunham*, 29 Gr. 258.

Both questions must be answered in favour of the plaintiff. The costs will come out of the estate of James Reid.

[QUEEN'S BENCH DIVISION.]

RE KIELY.

Municipal Law—Livery stable—Power to regulate and license in cities having police commissioners—49 Vic. ch. 37, sec. 9 (O.)—Ultra vires.

The board of police commissioners in cities is the body which alone has the power, under 49 Vic. ch. 37, sec. 9 (O.), to regulate and license livery stables, and this power includes the power to declare in what localities such stables shall be allowed; therefore, a by-law passed by the corporation of the City of Toronto, a city having a police board, assuming to declare it unlawful for any person to establish or keep such stable unless he shall have procured the consent of the majority of owners and lessees of property situate within the area of 500 feet of such stable, was held *ultra vires*.

Even if not *ultra vires* the by-law would have been objectionable in requiring, as a condition precedent to the granting of the license, that an applicant should procure the consent of a number of persons in the neighbourhood.

On 25 March, 1887, *Moss*, Q. C., and *Foster*, Q. C., moved to quash by-law No. 1702, of the city of Toronto, passed on 22nd July, 1886, so far as it provided that "it shall be unlawful for any person or persons to establish or keep any livery, trading, [*sic*] or sale stables, unless and until he shall have procured the consent in writing of a majority of the owners and lessees of the real property situate within an area of five hundred feet of the proposed site for such stable, and until he shall have obtained the consent of the Local Board of Health," upon the ground that the provisions complained of in said by-law were *ultra vires*, unreasonable, and in restraint of trade, and virtually prohibitive rather than regulative, and upon grounds, disclosed in the affidavits and papers filed.

The by-law applied to "any livery, boarding, sale, or other stables, or other place for the keeping of horses or other cattle in the city of Toronto, except as hereinafter provided, unless and until," &c. It required "the approval of the Medical Health Officer of the city of the plans and drawings and other sanitary appliances connected therewith," and also, as above stated, "the consent of the Local Board of Health thereto." It also contained the following provisions: "Provided that nothing herein con-

tained shall apply to any livery or sale stable heretofore established. Provided, also, that nothing herein contained shall be construed to prevent any person or persons from keeping horses upon their own premises for their own use."

Moss, Q. C., and *Foster*, Q. C., supported the motion. The applicant has erected extensive livery stables on Charles street in the city, at an expense of about \$7,000. The erection is on the most approved plans, sanitary and otherwise, but the city will not permit him to carry on his trade and business, and he has been fined \$5 for violating the by-law. The erection of the building was begun before the by-law was passed, and it is believed it was passed to prevent Kiely from getting the benefit of his building. The council had no power to pass the by-law, for by the 49 Vic. ch. 37, sec. 9, (O.), amending the Municipal Act of 1883, sec. 437, the power to license and regulate the owners of livery stables and of horses, &c., &c., used for hire, is vested, in cities, in the Board of Commissioners of Police, who have power for such purposes to pass by-laws and enforce the same in the manner and to the extent in which any by-law to be passed under the authority of this Act is to be enforced. A livery stable is not a nuisance: *Dillon* on Municipal Corporations, 3rd ed., sec. 379. The owners and lessees of property within the 500 feet are not required to be residents within that locality, nor within the city. It is doubtful, too, whether the consent of the majority of the owners and the majority of lessees is not also required. The by-law cannot delegate the power it has delegated to the board of health: *Dillon* on Municipal Corporations, 3rd ed., sec. 96; and as to delegation of powers, sec. 357. *Re McKnight and Toronto*, 3 O. R. 284, is a decision upon by-law 1231, which the present by-law amends. The following cases were also referred to: *Regina v. Hiscox*, 44 U. C. R. 214; *Elwood v. Bullock*, 6 Q. B. 383; *Wortley v. Nottingham*, 21 L. T. N. S. 882; *Waite v. Local Board of Health of Garston*, L. R. 3 Q. B. 5.; *Joseph & Har.* Municipal Manual, 4th ed., 424, referring to cases upon this point; *Re McKenzie*, 4 O. R. 382.

Christopher Robinson, Q. C., contra.

Kiely had not begun the erection before the by-law was passed. [This was contradicted by the counsel for Kiely.] Whether the by-law is reasonable or not must to a great extent be determined by extraneous circumstances. Charles street is a street used almost wholly for private residences ; and that which may not be a nuisance in one locality may be so in another. It is not a business street. This erection affects the value of buildings and property there from fifteen to thirty per cent. The Municipal Amendment Act, 1884, ch. 32, sec. 13, sub-sec. 6, gives power to the council to pass this by-law. It is that the council may pass by-laws "for preventing or regulating the keeping of cows, goats, pigs, and other animals, and defining limits within which the same may be kept." Mr. Fraser, the applicant, says he cannot rent houses he has on Charles street, in consequence of the building being designed for a livery. He has laid out a large sum there in building. There is a discretion in the Court whether to quash a by-law or not. He referred to *Dillon* on Municipal Corporations, 3rd ed., sec. 375 ; *Wood* on Nuisances, secs. 515 to 529.

April 7, 1887. WILSON, C. J.—As to the by-law itself. It enacts that it shall not be lawful for any person to establish or keep any livery, &c. If there were no other qualifying words in the by-law it could not be sustained, for it would not only prohibit the establishing of a livery, &c., but the keeping even of one, which would be a prohibition to continue a livery, &c., already established, and it would prohibit also the keeping of horses for private use in the owner's own stable. The last case, however, is expressly provided for by a special proviso.

As to the other part of the enactment, the first proviso declares that nothing in the Act contained shall apply to any livery or sale stable theretofore established ; so that as to these places the by-law is prospective only, and not objectionable on the ground of its being retrospective.

Nor is it an absolute prohibition against the establishing or keeping of future livery, &c., but a limited prohibition, subject merely to certain conditions; and as to which, assuming for the present the council has the power to pass such a by-law, or that the power for that purpose is not vested wholly in the commissioners of police, the only question is whether the conditions so imposed are reasonable or not.

There is also a matter to be considered in the first part of the section. It declares it shall not be lawful for any person to establish or keep any *livery, boarding, sale, or other stables, or other places* for the keeping of horses, &c., while the proviso excepts from that enumeration only any *livery or sale stable heretofore established*; so that a *boarding stable* and *other stables* [which are not a *livery or sale stable*] and *other places* for the keeping of horses, &c., [excepting, of course, according to the second proviso, "the keeping of horses by persons upon their own premises for their own use,"] are prohibited from being established or kept. I cannot read *or for and* here, because, while certain named places are mentioned in the enactment, only part of these named places are mentioned in the proviso.

The question is, what is the effect of that limited proviso upon the large enumeration of places in the enactment? The first question I shall consider is, whether the council had the power to pass the by-law, or whether the police commissioners are not the body to exercise that power. That depends upon the construction of the 49 Vic. ch. 37, sec. 9 (O.), amending the Municipal Act of 1883, sec. 437. The section enacts that the board of commissioners of police shall in cities regulate and license the owners of livery stables and of horses, cabs, &c., used for hire, and shall establish the rate of fare to be taken by the owners or drivers, &c.. 3. And may provide for enforcing payment of such rates. 4. And for such purposes pass by-laws and enforce the same in the manner and to the extent in which any by-law to be passed under the authority of this Act may be enforced.

The city council has the power, as before stated, by 47 Vic. ch. 32, sec. 13, sub-sec. 6 (O.), to pass by-laws "for preventing or regulating the keeping of cows, goats, pigs, and other animals, and defining limits within which the same may be kept."

It must be noticed that horses are not named in that enactment. The enactment begins with cows, and then names goats and pigs, and generalises with the concluding provision as to *other animals*. The section would certainly include sheep, but I am of opinion it does not include horses, which may be said to be the worthier animal, and which would have been named the first in order if it had been intended to include them.

By the 29 & 30 Vic. ch. 51, the power was vested in the council to regulate and license the owners of livery stables, section 296, sub-sec. 31. By the 31 Vic. ch. 30, sec. 33, that power was expressly transferred to the board of commissioners of police in cities, and it has continued vested in that body to the present time.

There was no express provision made up to the adoption of the R. S. O. ch. 174, as to the keeping of cattle, &c., in the city: see sec. 466 of that Act, sub-sec. 17; in which latter sub-sec. the words by the 44 Vic. ch. 24, sec. 12, "including the keeping of cattle and pigs or swine and cattle or cow-byres and piggeries," were added; and that sub-section remained the same in the Municipal Act of 1883, sec. 496, sub-sec. 7. But by the Municipal Amendment Act 47 Vic. ch. 32, sec. 13, the part of the sub-section relating to slaughter houses, &c., became sub-section 5 of section 13; and that part relating to cows, &c., became a sub-section of the same section. The effect of these enactments is that the Municipal Council has no express power to control livery stables, horses, &c., as the power of licensing and regulating them is expressly given to the commissioners of police; and sub-section 6 just mentioned does not, I think, include horses under the terms, *and other animals*, for the reasons before given.

It is not disputed that the commissioners of police alone have the power to regulate and license livery stables. It must, therefore, be contended the council has not assumed to do so. What then does the by-law provide for?

It declares it shall not be lawful for any person to establish or keep, as qualified by the provisoes, a livery stable, &c., unless and until he has procured the consent in writing of a majority of the owners and lessees of the real property situate within an area of 500 feet of the proposed site for such stable, &c.

Is that a regulating and licensing or an interference with the powers of regulating and licensing which are conferred upon the police commissioners?

The 31 Vic. ch. 30, sec. 33, enacted that the board of commissioners of police in cities shall have the powers vested in city councils by sec. 296, sub-sec. 31, [of the Act of 1886] *instead of city councils*, and these powers, by the Act of 1886, were the same as the commissioners of police have now for regulating and licensing the owners of livery stables, &c.; and these powers were, as the Act says, vested in the commissioners instead of the city council; and ch. there is the further expressive declaration in the 49 Vic. 37, sec. 9, sub-sec. 2 (O.), to the like effect, that "the council of any city in which there is no board of commissioners of police shall have and may exercise by by-law all the powers conferred upon the board of commissioners by this section."

It appears to me the provision of the city by-law in question relates to matters which the commissioners of police could provide for by by-law of their own.

I am of opinion the board of police is the body which alone has the power to regulate and license livery stables, &c.; that the by-law of the city is one which assumes to regulate them, and cannot be supported. The power to *regulate* confers upon the commissioners the power to declare in what locality or localities such stables shall be allowed.

I am not so assured that the applicant for a license to have such a stable can be required to procure the consent

of any number of the owners of property or of the residents within a certain distance of the proposed site of the livery, as a condition precedent to his obtaining his license, for that is a matter in the discretion of the commissioners, upon which they must be guided by their own judgment. See the case of *Elwood v. Bullock*, 6 Q. B. 383. It appeared to me to be somewhat of a delegation to the persons whose consent is to be exercised by the commissioners.

It is as much a delegation to that number of persons as it would be to require the applicant to get the consent of the Municipal or Parliamentary representatives of that locality, or of any other person or body, as a condition to the commissioners acting. The commissioners could no doubt take an opinion from any one or from any body to enable them to decide whether the license should be granted or not, and exercise their judgment upon such information. I have referred to the cases which were cited on the argument.

The conclusion I come to is,

1. The by-law is *ultra vires*, because the right to pass it is expressly vested in the board of commissioners of police.

2. The by-law, if not *ultra vires*, is objectionable, because it requires, as a condition precedent to the granting of a license, that the applicant shall procure the consent of a number of persons in the neighbourhood, thus constituting these persons the judges of the right he asks, and divesting the commissioners of the power which they are required personally to exercise.

The subject of the by-law is, in the main, a police regulation, but it concerns and affects trade and an ordinary pursuit and business of life, and a necessity in such a city as this is, and it is not necessarily a nuisance. It may, however, by careless management become so. If so, it may be prosecuted and suppressed.

I am obliged to quash the by-law, and with costs.

By-law quashed, with costs.

[CHANCERY DIVISION.]

STEWART V. GAGE.

Assignment for benefit of creditors—Judgment against assignor after assignment—Proof of claim—Statute of Limitations—Balancing of accounts—Payments on account—Appropriation of payments—Interest.

S. was an assignee for the benefit of creditors of J. E. and G. was similarly assignee of E. H. E. Before the assignments J. E. was a creditor of E. H. E. for money lent and as holder of certain notes. After the assignments S. obtained a judgment against E. H. E., but G. refused to recognize S. as a creditor on E. H. E.'s estate by virtue of the judgment. S. then brought an action against G. for an account of G.'s dealings with the estate of E. H. E., and for payment of the judgment. G. set up the Statute of Limitations. On a reference to a Master he found: (1) That the judgment was an answer to the defence of the Statute of Limitations; (2) That there had been a balancing of accounts between J. E. and E. H. E. as to the account before E. H. E.'s assignment and as to the notes after E. H. E.'s assignment and that each balancing of accounts was such a balancing as prevented the operation of the Statute of Limitations; (3) That before the assignments and within six years of action brought E. H. E. paid several sums to J. E. on general account and that such payments as far as the general account outside of the notes was concerned prevented the operation of the Statute of Limitations; (4) That E. H. E. agreed to pay interest to J. E. and he allowed it to him; (5) That he disallowed some of the items of the judgment as not having been proved outside of the judgment; (6) That he disallowed certain sums of money omitted from the plaintiff's claim—although proved to his satisfaction, as outside the scope of the reference.

On an appeal from the Master it was,

Held, That the judgment recovered against E. H. E. after his assignment in an action to which G. was not a party was not even *prima facie* evidence against G. *Eccles v. Lowry*, 23 Gr. 167, considered.

That the balancing of accounts, before the assignments, upon the general account, and also the payments on account were sufficient to prevent the operation of the Statute.

That the balancing of accounts, after the assignments, as to the notes did not prevent the operation of the Statute.

That by reason of the payments made on general account being appropriated to the account of the whole indebtedness including the notes, the latter were not barred by the Statute.

That the interest was properly allowed as it was included in the balancing of accounts and the notes were payable with interest.

The rule in bankruptcy that interest should not be allowed after the date of the commission does not apply in the case of voluntary assignments for the benefit of creditors.

THIS was an appeal and cross-appeal from the report of the Master at Barrie.

The plaintiff was assignee for the benefit of the creditors of James Edwards under an assignment made on the 25th April, 1883; and the defendant was assignee for the benefit

of the creditors of Edmund Herbert Edwards, a son of James Edwards, under an assignment made on the 16th April, 1883.

The plaintiff obtained judgment against E. H. Edwards on the 19th June, 1884, for \$8,962.45. The present defendant Gage refused to pay that sum until the true amount was ascertained in this Division. The plaintiff thereupon brought this action claiming to have an account of the dealings of the defendant with E. H. Edwards's estate and to be paid the amount of the said judgment; and the defendant by his statement of defence asked that an account be taken of the dealings between the said E. H. Edwards and James Edwards.

On the 11th March, 1885, the Chancellor made an order referring the matters of account in this action to the local Master at Barrie, with all the powers as to amendment of a Judge of the High Court of Justice.

The Statute of Limitations had not been set up as a defence and various proceedings were taken to enable the defendant to set it up in the Master's office: and they resulted in his being permitted to do so.

On the 14th December, 1886, the local Master made his report finding due to the plaintiff as assignee of James Edwards the sum of \$9,907.21. He also found that the judgment against E. H. Edwards was an answer to the defence of the Statute of Limitations. He further found that there was a balancing of accounts between the said E. H. Edwards and James Edwards with reference to the general account before the assignment made by E. H. Edwards to the defendant, and after the said assignment as to the claim under the promissory notes; and that each balancing of accounts was such an acknowledgment as prevented the operation of the Statute of Limitations. He further found that within six years before this action was brought, and prior to the date of the assignment, E. H. Edwards paid several sums of money to the said James Edwards on general account, and that such payments as far as the general account outside of the notes was concerned

prevented the operation of the Statute of Limitations. The local Master allowed interest on the notes referred to at the rate mentioned in them (eight per cent.) until due and after that at six per cent. He also found that E. H. Edwards agreed to pay interest to James Edwards and he allowed it to the plaintiff at six per cent., as moneys advanced by James Edwards to E. H. Edwards.

The Master certified that by his direction the plaintiff filed particulars of his claim against the defendant as represented by the judgment, and upon inquiry he disallowed some of the items which formed the said judgment as not having been proved by the plaintiff outside of the judgment; and that the plaintiff proved to his satisfaction that several sums of money other than those mentioned in the said account had been advanced by the said James Edwards to E. H. Edwards, before their respective assignments, but by error these had been omitted from the particulars of the plaintiff's claim, and that he refused to allow these items to be added considering them outside the scope of the reference.

The plaintiff appealed from the report because the Master refused to allow him to add these items to his account.

The defendant appealed from the report (1) Because the Master allowed the claim upon the promissory notes while he should have found they were barred by the Statute of Limitations (2) Because the Master allowed interest to the plaintiff on the items of account, and found that E. H. Edwards agreed to pay interest, contrary to the evidence and against the weight of evidence. (3) Because the Master erred in finding the said judgment an answer to the Statute of Limitations, and in allowing the plaintiff the costs of the judgment.

The appeal and cross-appeal were argued on January 13th, 1887, before Proudfoot, J.

Marsh for the plaintiff. The plaintiff's judgment was put in in the Master's office. The Master was wrong in dis-

allowing certain items of the plaintiff's claim against E. H. Edwards which he held were not proved outside of the plaintiff's judgment. He put the *onus* of proof on the plaintiff and erred in doing so. The plaintiff's judgment was *prima facie* proof, and should have been so treated unless successfully attacked by the defendant. The Master should have specified in a schedule or otherwise what items he disallowed. He should not have disallowed certain items omitted from the judgment which were proved outside of it. He held that such an allowance would be outside the scope of the reference.

W. M. Clark for the defendant. The Master should have disallowed the notes as barred by the Statute of Limitations. The accounts as to the notes were not balanced until after E. H. Edwards's assignment and could not bind his assignee. The judgment against him recovered after his assignment cannot bind his assignee. A trust declared by a will does not prevent the statute being set up by the executors: *Evans v. Tweedy*, 1 Beav. 55; *Scott v. Jones*, 4 Cl. & F. 391; *Darby's Statute of Limitations*, 190; *Burke v. Jones*, 2 V. & B. 275; *Hargreaves v. Michell*, 6 Mad. 326; *O'Connor v. Haslam*, 5 H. L. C. 170. The evidence shews there was no agreement in writing to pay interest—nothing was said about it for two years and none was paid: R. S. O. ch. 50 sec. 267; *Re Ross*, 29 Gr. 390. There should be no interest allowed after the assignment: *Hamilton v. Houghton*, 2 Bl. 169, 186; *Barwell v. Parker*, 2 Ves. Sr. 364; *Creuze v. Hunter*, 2 Ves. 157. The costs of the judgment recovered should not be allowed.

Marsh, in reply. The judgment is *prima facie* proof and is an answer to the Statute of Limitations, and binds the assignee, who is a mere agent or trustee to distribute his assignor's moneys, the latter still remaining liable for all his liabilities. The balancing of accounts and payments, which latter were made on the whole indebtedness, notes and accounts, and so appropriated by James Edwards, are sufficient to bar the Statute: *Munger* on Application of Pay-

ments, 102. Stating an account will take the account out of the operation of the statute: *Watkins v. Washburn*, 2 U. C. R. 291. The Statute of Limitations was set up by the assignee against the wish of E. H. Edwards, and he has the right to elect as the assets are his. [PROUDFOOT, J.—But he cannot interfere with his creditor's rights after his assignment.] The balancing as to the notes after the assignment, was such an admission as he had power to make *Pollock on Contracts*, 4th ed., 598; *Banning's Limitation of Actions*, 69, 201. In the absence of an application of the payments being made by either party, they were applicable first on the notes because they were the earlier indebtedness. I also refer to *Devaynes v. Noble*, *Clayton's Case*, 1 Mer. 584; *Cathcart v. Haggart*, 37 U. C. R. 47; *Hamilton v. Matthews*, 5 U. C. R. 148; *Catling v. Skoulding*, 6 T. R. 189; *Walker v. Butler*, 6 El. & B. 508; *Notman v. Crooks*, 10 U. C. R. 105; *Wood on Limitation of Actions*, 224. Interest may be allowed on an unliquidated debt: *Smart v. N. & D. R. W. Co.*, 12 C. P. 406.

February 2, 1887. PROUDFOOT, J. The defendant does not object to the Master being directed to take evidence of the items omitted from the account by error.

The main question is upon the Statute of Limitations, and whether sufficient has been shewn to prevent its operation.

I think the judgment recovered against E. H. Edwards after he had made an assignment to the defendant, in an action to which the defendant was not a party, is not even *prima facie* evidence against him. It is a proceeding in which the assignee had no opportunity of making a defence, or of having the amount of the debt correctly ascertained; and in which, in fact, no defence was made. The case of *Eccles v. Lowrey*, 23 Gr. 167, in which a judgment recovered against a personal representative was held to be *prima facie* evidence against the heirs rests upon a ground peculiar to itself, and has no application to the present. And as the judgment in itself is not evidence,

the costs of obtaining it should not have been allowed in the account.

The balancing of the accounts between James Edwards and E. H. Edwards, before either of them had made an assignment, and the finding due to James upon such settlement, upon the general account, is however sufficient to prevent the operation of the statute: *Watkins v. Washburn*, 2 U. C. R. 291. And so, also, is the payment upon the general account: *Hamilton v. Matthews*, 5 U. C. R. 148. Both the the balancing and the payments were within six years before action. They are not impeached upon any ground of fraud or preference, and there was evidence to justify the finding, if the Master believed it.

The case is different in respect of the promissory notes referred to in the report. There were three of these notes, each dated on the 1st May, 1874, one payable at three years, and two at four years after date. There was a statement of the amount due upon them, made between James Edwards and E. H. Edwards, but after the assignment made by the latter. I do not think the defendant is bound by such a statement or balancing, and that it does not prevent the operation of the Statute.

The Master also finds no payments made upon account of these notes. The plaintiff contended that the evidence would have justified a finding that the payments were made on account of the whole indebtedness of E. H. Edwards, including the notes. And that James Edwards had the right to appropriate the payment to either account he pleased.

The general rules on the subject of the appropriation of payments may be found in *Addison on Contracts*, 6th ed., 956, *et seq.* If the debtor paying makes no specific application at the time of payment, the creditor may apply it; and he may so apply it to a debt barred by the Statute of Limitations; *Mills v. Fowkes*, 5 Bing. N. C. 461; or to the discharge of a purely equitable debt; *Bosanquet v. Wray*, 6 Taunt. 597. The creditor may make the appropriation at any time before the case comes under the con-

sideration of a jury; *Philpott v. Jones*, 2 Ad. & E. 44, The equivalent to the jury would in this Division be the Master. The accounts filed by the plaintiff have not been left with me, but I may assume that they were substantially in the form of the schedule attached to the report; and if so, then the payments were appropriated by the plaintiff to the account of the whole indebtedness to James Edwards, including the notes. If the plaintiff did not so appropriate them, then the the Master has done so, and according to *Catheart v. Haggart*, 37 U. C. R. 47, that would suffice. In that case a verdict was taken subject to an award. Payments had been made by the defendant to the plaintiff and not appropriated by either of them, but the arbitrator applied them to the earlier items of the account, and this was held to be correct.

As to the notes, I do not see how this right of appropriation by the creditor can be affected by the debtor's assignment, I therefore think that they are not barred by the Statute.

The defendant complains of the allowance of interest. The Master finds that there was an agreement to pay interest; but it is said it ought to be in writing under C. L. P. Act sec. 267. But that statute does not require a promise to pay interest to be in writing. It says that upon any debt or sum certain payable by virtue of a written instrument, the jury may allow interest from the time it became payable. And if not payable upon a written instrument, then from the time of written demand claiming interest. But the 266th section of that Act says that interest shall be payable in all cases in which it has been usual for a jury to allow it. In *Smart v. Detroit and Niagara River R. W. Co.*, 12 C. P. 404, 406, Draper, C. J., says: "It has become so settled a practice to allow interest on all accounts after the proper time of payment has gone by, and particularly upon the balance of an account which imports that the accounts on each side are made up, and only the difference claimed, that I do not think we should treat the claim for interest as vitiating the special endorse-

ment." Perhaps under this manner of viewing it, no promise was needed to entitle the plaintiff to interest. But there can be no room for doubt in the present case, for the interest was included in the settlement or balancing of accounts. As to the notes they were payable with interest.

But then it was said that interest should not have been allowed after the date of the assignment to the defendant, for the benefit of creditors. It was indeed the practice in bankruptcy that interest should not be allowed after the date of the commission: *Henley's Bankrupt Law*, 3rd ed., 135; *Clarke's Insolvent Acts*, 232. Insolvent Act of 1875, sec. 80. No authority was cited to show that the rule applies in the case of voluntary assignments for the benefit of creditors and in the absence of any such restriction, the interest should be allowed under C. L. P. Act, sec. 266.

It was said on the part of the plaintiff that the Master should have specified the particular items he had disallowed as not having been sufficiently proved, and placed them in a schedule to enable the plaintiff to determine whether his finding was correct or not. I do not think he was bound to do so: at all events, in the absence of any request to schedule them, and none such appears to have been made. In proceeding upon the accounts in the Master's office the plaintiff must or ought to have been aware of the items that were disallowed, and he did not need any specification of the Master to inform him.

The appeal of the plaintiff is allowed, with costs.

The first and second grounds of the defendant's appeal are dismissed, with costs.

The third ground of defendant's appeal is allowed, with costs; and it will be referred back to the Master to take an account of the omitted items.

G. A. R.

[CHANCERY DIVISION.]

THE HAMILTON AND MILTON ROAD CO. v. RASPBERRY.

Statutory remedy for penalty—Relief by injunction.

On a motion by a road company for an injunction to restrain the defendant from passing through their toll-gates without paying tolls when demanded, it was contended that because there was a statutory remedy for the recovery of a penalty for each offence under sec. 123, of R. S. O. ch. 152, the Court would not interfere by way of injunction.

Held, that as the plaintiffs had established a *prima facie* case in regard to the rights they claimed, there was jurisdiction to interfere by way of injunction pending the determination of the question at the trial and an injunction was granted, upon a consideration of the balance of convenience, in favour of the plaintiffs. *Letton v. Guodden*, L. R. 2 Eq. 130 and *Cory v. Yarmouth, &c., R. W. Co.*, 3 Ha. 593 considered and followed.

THIS was a motion for an injunction in an action by The Hamilton and Milton Road Co., against John Raspberry, to restrain the defendant from passing through the toll-gates of the plaintiffs without paying tolls, when properly demanded.

It appeared that the plaintiffs had sold out to The Hamilton and Flamborough Road Co., and that by litigation, which had been carried to the Court of Appeal,* it was decided that the latter company was not properly organized and could not collect tolls, 13 A. R. 534. The effect of that judgment of the Court of Appeal was to restore to the plaintiffs the franchises they held before the abortive sale: *Re Hamilton, Milton Road Co. v. East Flamborough*, 13 O. R. 128.

The motion was argued on February 8th, 1887, before Ferguson, J.

Waddell, for the plaintiffs, stated the case and asked for the injunction.

*A good deal of argument was had on the facts, and as to the position of the plaintiffs as a company, but as it is not material to the part of the judgment reported, it is omitted.—REP.

Osler, Q. C., for the defendant. The plaintiffs have a statutory remedy under R. S. O. ch. 152, sec. 129, and cannot come to this Court to interfere, by way of injunction: *High on Injunctions*, 2nd ed., p. 25, sec. 29. The granting of this motion would really be an injunction to collect a ten-cent toll.

Waddell, in reply. There is a daily trespass committed by the defendant, and the plaintiffs are not compelled to seek the statutory remedy after the commission of each. They are entitled to an injunction to quiet their right, and save unnecessary litigation.

February 12, 1887. FERGUSON, J.—(After a careful *re-sume* of the facts of the case, the learned Judge found that the plaintiffs were entitled to collect tolls, and then proceeded as follows.) In the argument, reference was made to the 129th section of the Act, ch. 152, R. S. O., which provides a remedy against persons passing the toll-gate, refusing to pay or without paying the toll, and I was referred to *High on Injunctions*, 2nd ed., sec. 29, at p. 25, where it is laid down generally that when a positive statutory remedy exists for the redress of particular grievances, a Court of Equity will not interfere by injunction and assume jurisdiction of the question involved; nor will it enjoin proceedings under such statutory remedy, since such interference would place the judicial above the legislative power. The case referred to by the author is *Brown's Appeal*, 66 Penn. State, 155. It was a case between landlord and tenant, where the landlord had commenced proceedings under an Act of 1863, before a magistrate, to recover possession of the land from the tenant. The Court of Common Pleas, before judgment, enjoined the magistrate and plaintiff. The reason assigned was hardship, or supposed hardship. The judgment was reversed in appeal, apparently on the ground that the proceedings provided for by the statute constituted a complete remedy, and whether the provision was a wise one or not was not a matter to be questioned

and that the Court of Common Pleas should not have interfered by injunction. A clause in the headnote is, that where there is a positive statutory remedy which may be pursued, equity cannot interfere on the ground of irreparable mischief. This conclusion was placed seemingly on the ground that the proceedings that were enjoined were strictly legal, and the maxim that the "law injures no one."

I think I need not stop to consider how far the decision and the statement of the learned author are in point here, for, it seems to me that the decision of Sir R. T. Kindersley, V. C., in the case *Letton v. Goodden*, L. R. 2 Eq., at p. 130, is much more nearly in point where that learned Judge said: "It is contended for the defendants that, irrespective of the question whether the plaintiff has the right which he claims, he has no right to file a bill in this Court for relief, but that he must pursue the remedy given him by the Act of Parliament, which does not in terms prohibit the carrying of passengers, but only imposes a penalty in respect of each passenger carried. But I am of the opinion that the plaintiff, if he has the right which he claims, is entitled to file this bill, which is in the nature of a Bill of Peace, to quiet his right; and that he is not bound from time to time to try the question by proceedings to enforce the penalty."

In the case *Cory v. Yarmouth, &c., R. W. Co.*, 3 Ha. 593, the penal clause in the Act of Parliament that was relied on much resembled the section in our Act above referred to, and it was held that although the Act (which was an Act which substituted a bridge for a ferry) gave the owner of the bridge no right of action against persons evading the tolls, yet if he was entitled to recover penalties against offenders under the Act *de diè in diem*, the Court would protect him by injunction from the infringement of his right.

If it be assumed that the plaintiffs have the right to collect the tolls, and that the defendant has the right to travel upon the road on paying the tolls, and only

upon paying the tolls, and the defendant insists upon travelling upon the roads and passing by or through the gates without paying the tolls, I do not perceive why this, if done and accomplished by the defendant, is not an infringement of the rights of the plaintiffs, and I am of the opinion that if it appears that the plaintiffs have established a *prima facie* case in regard to the rights that they claim, (and I have already said that I think they have) there is jurisdiction to interfere by way of an injunction, pending the determination of the question at the trial of the action; and I think the motion should now be considered upon the balance of convenience and inconvenience.

Does it appear that greater damage will arise to the defendant by granting the injunction in the event of it turning out afterwards to have been wrongly granted, than to the plaintiffs from withholding it in the event of the legal right proving to be in their favor? Or does it appear that greater damage would arise to the plaintiffs by withholding the injunction in the event of the legal right proving to be in their favor, than to the defendant by granting the injunction in the event of the injunction afterwards proving to have been wrongly granted? If the former question were answered in the affirmative, the motion should be ordered to stand over till the trial. If the latter question were answered in the affirmative, the injunction should issue, or under the provisions of the Judicature Act the order should be made.

After the best consideration that I have been able to give this matter of fact, I am of the opinion that the balance of convenience and inconvenience is such that the latter of these two questions should be answered in the affirmative and that an order for the injunction should be made, and that the plaintiffs, as a condition thereof, should undertake to keep an accurate account of all moneys received for tolls from the defendant, and to pay all damages that the defendant may sustain or be put to by reason of the making of the order; and to pay these and the moneys received for tolls to the defendant, upon the final deter-

mination of the right adversely to the plaintiffs' contention, if the right should be so determined.

I am also of the opinion that the order should be confined to the passing and repassing by the defendant, his servants, &c., &c., through any of the toll-gates mentioned in the notice of motion, without having first paid the legal toll when properly demanded.

As to the other matters in respect of which an injunction is asked, I am of the opinion that no sufficient case has been made against the defendant. Nothing need be said now as to costs of the motion. They are, as a rule, understood to be reserved to the trial, to be then disposed of. If thought necessary they may be so reserved by the order.

Order accordingly.

G. A. R.

[COMMON PLEAS DIVISION.]

REGINA V. HEATH.

Canada Temperance Act 1878, ss. 99, 100—Conviction of buyer of liquor as aider and abettor—32 & 33 Vic. ch. 31, s. 15, (D.)

The provisions of 32 & 33 Vic. ch. 31, (D.) apply to the Canada Temperance Act, 1878, except in so far as the provisions of the latter Act show that they were not intended to apply thereto.

Held, that a buyer of liquor cannot in respect of a sale thereof made to him, be regarded in point of law as an aider, abettor, counsellor, or procurer, so as to come within sec. 15 of 32 & 33 Vic. ch. 31, (D.), and render that section applicable to an offence under sec. 99 of the Canada Temperance Act.

A conviction of a buyer of liquor as such aider, &c., was therefore quashed.

William Heath was, on the sixth day of October, 1886, convicted by two Justices of the Peace for the county of Lambton, for that he the said William Heath, between the 28th day of August, 1886 and the 28th of September, 1886, unlawfully did aid, abet, counsel, and procure James Beatty in selling to him the said William Heath spirituous and intoxicating liquors at the township of Sombra, in the county of Lambton, in violation of the second part of the Canada Temperance Act of 1878, then and there being in force; and was by them adjudged for his said offence, to forfeit and pay the sum of \$50, to be paid and applied according to law; and to pay to James Beatty the complainant, the sum of \$25 for his costs in that behalf.

This conviction and the information upon which the same was made and the evidence adduced thereon, were brought into this Court by writ of *certiorari*, tested the 28th day of October, 1886; and it appeared from the evidence that the Canada Temperance Act of 1878, was in force in the county of Lambton: that the complainant James Beatty was prosecuted for selling liquor in that county between the 28th day of August and 28th day of September, 1886; and the said William Heath testified to his selling liquor to him the said William Heath

between those days ; and that thereupon the complainant James Beatty laid the information upon which this conviction was founded, and proved that he sold liquor to the said William Heath, at his request, between those days ; and upon this evidence the said William Heath was convicted, and the said conviction was made.

On November 12, 1886, *Milligan* obtained an order *nisi* to quash the said conviction, on the grounds following : 1. That the evidence did not disclose any offence upon which the conviction could be supported ; 2. That the evidence disclosed that the defendant merely bought liquor from the informer James Beatty, which was not an offence for which the said defendant could be convicted ; 3. That the mere buying of liquor did not constitute any offence against the provisions of the Canada Temperance Act of 1878, and did not constitute an aiding, abetting, counselling, and procuring within the meaning of the Act respecting the duties of Justices of the Peace out of Sessions in relation to summary convictions and orders.

On 30th November, 1886, *Delamere* and *Milligan*, supported the order *nisi*.

Frazer contra.

January 10, 1887. ARMOUR, J.—The Canada Temperance Act of 1878, provides, sec. 99, that “no person,” unless for the purposes and under the provisions therein set forth, “shall by himself, his clerk, servant or agent, expose, or keep for sale, or directly or indirectly on any pretence, or upon any device, sell, or barter, or in consideration of the purchase of any other property, give to any other person, any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage and part of which is spirituous or otherwise intoxicating ;” and sec. 100, that “Whoever, by himself, his clerk, servant or agent, exposes or keeps for sale, or directly or indirectly, on any pretence or by any device, sells, or barter, or, in consideration of the purchase of any other property, gives to any other person, any spirituous or other intoxicating

liquor, or any mixed liquor capable of being used as a beverage and a part of which is spirituous or otherwise intoxicating in violation of the second part of this Act, shall be liable on summary conviction to a penalty of not less than fifty dollars for the first offence, and not less than one hundred dollars for the second offence, and to be imprisoned for a term not exceeding two months for the third and for every subsequent offence;" and "whoever, in the employment or on the premises of another, so exposes or keeps for sale, or sells, or barter, or gives in violation of the said second part of this Act shall be held equally guilty with the principal, and shall be liable on summary conviction to the same penalty or punishment."

An offence against the Canada Temperance Act of 1878, is "an offence or act over which the Parliament of Canada has jurisdiction;" and consequently the provisions of the Act 32 & 33 Vic. ch. 31, (D.), apply to it except in so far as the provisions of the Canada Temperance Act of 1878, show that they were not intended to apply to it.

Section 15 of the Act 32 & 33 Vic. ch. 31, (D.), provides that "Every person who aids, abets, counsels or procures the commission of any offence which is punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable, on conviction, to the same forfeiture and punishment as the principal offender."

Now I do not think that this section applies to an offence against section 99 of the Canada Temperance Act of 1878 : (1) Because section 107 of the Canada Temperance Act of 1878, while providing that "every offence against the second part of this Act may be prosecuted in the manner directed by the Act," 32 & 33 Vic. ch. 31 (D.), "so far as no provision is hereby made for any matter or thing which may be required to be done with respect to such prosecution; and all the provisions contained in the said Act shall be applicable to such prosecutions, and to the judicial and other officers before whom the same are hereby authorized

to be brought, in the same manner as if they were incorporated in this Act, and as if all such judicial and other officers were named in the said Act," does not provide that section 15 shall be applicable thereto or incorporated therein.

(2.) Because section 99 in terms prohibits only the exposing or keeping for sale, selling, bartering, or giving, and does not expressly prohibit the buying or receiving by way of barter or gift; and section 100 imposes a penalty only on the person exposing or keeping for sale, selling, bartering, or giving, and imposes no penalty upon the person buying or receiving by way of barter or gift.

(3.) And because by section 100 special provision is made against aiders and abettors by providing that "whoever, in the employment or on the premises of another, so exposes or keeps for sale, or sells, or barters, or gives in violation of the said second part of this Act, shall be held equally guilty with the principal, and shall be liable on summary conviction to the same penalty or punishment;" and a person offending against this provision is an aider and abettor, and would probably, in the absence of any such provision, be punishable as such under section 15: *Wilson v. Stewart*, 3 B. & S. 913.

A clear distinction is drawn in sections 99 and 100 between the exposing or keeping for sale, selling, bartering or giving, and the buying or receiving by way of barter or gift. The former is expressly prohibited; the latter is not expressly prohibited; and a penalty is imposed upon the person exposing or keeping for sale, selling, bartering, or giving, and no penalty is imposed upon the person buying or receiving by way of barter or gift.

In section 100, aiders and abettors in the offences created by section 99, are defined and described, and are made punishable in the same manner as their principals; and this provision impliedly excludes aiders and abettors otherwise offending than as is therein defined and described.

It would be contrary to the manifest intention of the Legislature if a buyer, upon whom no penalty has been

imposed, could be made liable to punishment as an aider and abettor of the seller.

But a buyer cannot, in respect of a sale made to him by a seller, be regarded in point of law as an aider, abettor, counsellor, or procurer, a principal in the second degree, for he is not such, but an actual perpetrator, a principal in the first degree.

In every sale there must be a seller and a buyer, the assent of each is equally required, and each participates in the sale in an equal degree; neither of them is in the sense of the law an aider, abettor, counsellor, or procurer, but each is an actual perpetrator; neither is a principal in the second degree, as aiders, abettors, counsellors, and procurers are, but each is a principal in the first degree.

In a sense each procures the other to make the sale, but not in the sense of the law; neither of them is a procurer in the sense of the law.

If two men go out to fight by mutual agreement and do fight, each is guilty of an assault; and, although in a sense, each procures the commission of the assault, yet neither does so in the sense of the law; each is a principal in the first degree, an actual perpetrator and not a principal in the second degree, an aider, abettor, counsellor, or procurer. See *Regina v. Coney*, 8 Q. B. D. 534.

Mr. Lash kindly referred me to American authorities upon similar questions raised under licensing and prohibiting laws, resembling in their provisions sections 99 and 100 of the Canada Temperance Act of 1878, and section 15 of 32 & 33 Vic. ch. 31, (D.) the principal of which are *Commonwealth v. Willard*, 22 Pick. 476; *State v. Rand*, 51 N. H. 361, and *State v. Bonner*, 2 Head. 135, and they and others are to be found in *Bishop's Criminal Law*, 7th ed., sec. 658, note 4. I also refer to *Seager v. White*, 51 L. T. N. S. 261.

In my opinion the defendant was guilty of no offence against the law, and the conviction must be quashed.

Conviction quashed.

[COMMON PLEAS DIVISION.]

HOWELL V. THE LISTOWELL RINK AND PARK COMPANY
ET AL.

Illegal distress—Notice of distress—Appraisement—Tender—Authority of bailiff—Damages—Fixtures.

On a distress for rent no notice thereof in writing was given to the lessee ; nor a legal appraisement made before sale ; and the actual value of the goods sold was much greater than the amount due for rent.

Held that the distress was illegal.

In proof of an alleged tender to the bailiff, the plaintiff said that he asked the bailiff for a bill of demands, with all costs, and he would pay him : that he, plaintiff, had then \$87 in his hand, which was sufficient to pay the rent and costs, and said, " Here is your money ; " but that the bailiff refused to receive it. This was denied by the bailiff ; but the question was left to the jury, who found that there was a tender. The goods distrained were afterwards sold by the bailiff.

Held, that on the evidence the finding of the jury could not be interfered with, and there must be held to have been a tender to the bailiff ; and that the landlord was responsible for the bailiff's act. *Matheson v. Kelly*, 24 C. P. 598, distinguished.

Held, also, that by reason of the illegal distress the plaintiff would be entitled to recover as damages the difference between the goods and the rent due ; but as the sale was after the tender, the plaintiff could recover the full value of the goods.

Quere, whether the plaintiff here, the proprietor of a skating rink, was a person engaged in trade, so as to make fixtures used in his business exempt from distress ?

Under the particular circumstances herein, a hardwood flooring, put down specially for skating, and capable of removal, was held to be a tenant fixture, and exempt from distress. There was no finding by the jury that the flooring could be restored in the same plight as before distress ; but in view of the finding of the tender having been made, this was not now material.

Held, also, that on the evidence there was no abandonment of the premises by the plaintiff, nor were the damages found excessive.

H., who was the president of the defendants, an incorporated company, and also a member of an incorporated gas company, purchased the goods at the sale for the gas company. The Judge at the trial charged the jury, that H. was both seller and buyer, and that the sale was void.

Held a misdirection ; but as it appeared that no substantial wrong or miscarriage was occasioned thereby, the Court, under Rule 311, O.J.A., could not interfere.

THE plaintiff was a tenant of the defendants, the Rink Company, of a building known as the Listowell Rink, situate in the village of Listowell, under a lease dated the 5th of March, 1885, for the term of seven months, to be computed from the 1st of April, 1885, or as soon thereafter as the

ice could be got off the floor of the said building, at the monthly rent of \$25, payable every month in advance, the first payment to be made on the 1st day of April then next.

The plaintiff took possession of the building on the 18th day of April, 1885, that being the day when the ice was got off the floor of the building. He then, on the 25th day of April, paid a month's rent in advance; and subsequently on the 26th day of May, he paid a second month's rent in advance, making his rent paid up to the 18th June. He rented the premises for a Roller-skating Rink; and, to make it suitable for that purpose, caused strips to be laid on the existing floor of the rink, and upon these strips he made a new floor of narrow hardwood boards that cost him \$187. He also purchased and used in the rink fifty-three pairs of roller skates, which, with duties and express charges, cost him about \$140, and had some other trifling articles there valued at about \$10. He had associated with him one Johnston; and about the 1st of July, 1885, not, as he alleged in evidence, feeling well, went to St. Catharines, where he had been living before, leaving Johnston behind in charge of the rink. After he left Johnston went away to St. Thomas; and the defendants, the Roller Rink Company, without communicating with the plaintiff, on the 26th day of July, 1885, gave a warrant to the defendant James Osborne, authorizing him to distrain the goods and chattels upon the demised premises for two month's rent, \$50.

Under this warrant the defendant Osborne seized the plaintiff's roller skates, a grindstone, two crocks, two pails, and the hardwood flooring then nailed to the strips as above mentioned; the person in charge of the building having opened the door for him to enter in ignorance that his object was to distrain, and under the belief that he wished to examine some broken windows. When they got in the defendant Osborne demanded and obtained the keys of the building, which he locked and retained possession of.

On the 28th day of July he put up the following notice :

" BAILIFF'S SALE.

" Notice is hereby given that the goods and chattels distrained for rent on the 27th day of July, 1885, by me, James Osborne, as bailiff to the Listowell Rink and Park Company, the landlord of the premises, of Alexander Howell, the tenant, will be sold by public auction on the fourth day of August, 1885, at 3 o'clock in the afternoon, which goods and chattels are as follows, that is to say :—Fifty-three pairs of roller skates, one grindstone, two crocks, two pails, fifty-six chairs, about 8,000 feet planed hardwood flooring.

" 28th day of July. (Signed)

" JAMES OSBORNE, Bailiff."

On the 31st July, 1885, the plaintiff, then being in St. Catherines, telegraphed to the president of the company as follows :

" Hear rink is seized ; when is the sale ; can you hold until Monday ; will be up and settle all claims."

On the 1st of August the president replied by telegraph :

" Sale Tuesday fourth ; claim about eighty-five dollars."

The plaintiff then went to Listowell, getting there on the evening of the 3rd of August, and saw the defendant Osborne at the Queen's Hotel ; and in his evidence gave in substance the following account of what took place :

" I asked him if he would give me a bill of demands with all costs, and I would pay him ; and at the same time when I said this I had \$87.00 in my hand, and the expression I made was, '*Here is your money.*' I shewed him the money. He said, if I give you that one hour before the sale that is all the law requires."

On the same day, the 3rd of August, the rink company gave the defendant Osborne another distress warrant authorizing him to distrain for \$75.00 rent due on the 1st of August.

In reference to which the plaintiff swore that the defendant Osborne said, at the above interview :

" I have one warrant here of \$50, and there is a gas bill and another warrant of \$75. He did not tell me what the gas bill was. After he refused, as he went out of the door he said : '*If I give it to you an hour before the sale that is all I require.*'"

In cross-examination he gave the following account of what took place between him and Osborne: "I went into the room. Mr. Osborne came to me and said, 'I have got your place seized'; said I, 'yes; if you will give me a bill of demands I will pay you.' At this time I had \$87 in my hands. At the time there were there Johnston, Rolls, and Frank Leak.

To the question you did not offer him the money? He said: "Yes, I had the money in my hand; I said, here is the money. That took place in the Queen's Hotel."

Johnston Rolls and Frank Leak were examined, and their evidence did not go nearly so far towards proving a tender as the plaintiffs.

Johnson swore he (plaintiff) asked him for a bill of demands for the purpose of settling it. "I understood him to say that he was to settle it. He stretched his hand out like that towards him. I do not know that he had anything in his hand. He held his hand out while speaking to him. He had the other hand in his pocket. He did not mention anything about money that I heard of. I saw Howell with money. I would not say how much. I saw him with some bills."

Frank Leak, swore he was with the plaintiff at the Queen's Hotel, and saw Osborne there. "Mr. Howell spoke about them seizing the goods, and asked for the bill of demands; that he had come to settle it. I did not hear him say he had the money. When he told him that he wanted the bill of demands, that he had come to pay him; he held out his hand. I did not see anything in his hand. I saw him with money that night; he spent some."

The defendant Osborne would not swear whether the plaintiff made a demand for a bill of the demands or not. He said, "I could not say whether he did or not. He did not offer me any money. I did not see any money. I did not understand that he was making any offer of money. He did not make any offer to settle with money that night."

There was no sworn appraisement of the goods by two appraisers. There was an unsworn appraisement of a Mr. R. Ferguson, who appraised them at \$113.29.

There was no inventory of the goods or notice in writing of the distress served upon the plaintiff or put up on the rink, other than the notice of sale above set out.

The plaintiff, in his statement of claim, alleged (8) that the defendant Osborne wholly neglected and wrongfully omitted to give the plaintiff any notice of the distress. (9) That the defendants, the Listowell Rink and Park Company, and their agent, the defendant James Osborne, neglected to have the goods appraised by two sworn appraisers, contrary to the statute in that behalf. (10) The defendant James Osborne wrongfully neglected to give a copy of the demand, and all costs and charges, signed by him, to the plaintiff, contrary to the statute in that behalf. (13) The plaintiff was prepared and ready and willing to pay the defendant the full amount of rent due, and the costs of distress and levy, and all proper charges and expenses connected therewith; and after the seizure and before the sale of the goods and chattels, produced to the defendant James Osborne, and offered and tendered him the full amount of rent due, and proper costs and charges and expenses in connection with said distress; but the defendant, James Osborne, wholly refused to accept the same, or state to the plaintiff what, if any, amount he would accept in payment of rent distrained for, or the costs, charges and expenses of the seizure. (15) That the said defendants, the Listowell Rink and Park Company, and the defendant James Osborne, notwithstanding the said tender and the said wrongful and illegal acts complained of, retained possession of the said goods and chattels, and sold the same at a great sacrifice and in bulk lots, and entered and took possession of the said demised premises, and continued in possession of the same, and refused to permit the plaintiff to enter the same and take away and remove certain valuable books, papers, and documents belonging to him, and still wrongfully and unjustly detain the same. (16) The said goods and chattels were of the value of \$350—far more than any pretended claim of the defendants, the Listowell Rink and

Park company for rent, yet the same were sold in bulk by the defendants for a sum not exceeding \$50.

And, by leave of the Court at the trial, the plaintiff amended his statement of claim by adding the following paragraph thereto (19). The plaintiff further says that the defendants wrongfully and illegally seized certain goods and chattels of the plaintiff, which were tenant's fixtures, that is to say, 8000 feet of hard wood flooring, and unlawfully sold and disposed of the same under the said landlord's warrant, thereby causing great damage and loss to the plaintiff in respect thereof.

There was evidence that the defendants, the Rink company, had furnished different statements of their claim against the plaintiff. At one time, as shewn by the telegram sent by the president to the plaintiff at St. Catharine's, they claimed about \$85. At another a memorandum was made, making the amount claimed \$111.75, made up as follows: lawyer's fees, \$5.50; gas, \$20.25; rent, \$75; breakages, \$5.50; bailiff's fees, \$6.50, in respect of which they would accept \$85.25, if plaintiff would give up the place. And while there was no doubt of these claims having been made, the defendants, by the evidence of their officers, denied that they had made it a condition of acceptance of the \$85.25 that the plaintiff should give up the place or that they would not have withdrawn the distress, if paid the rent distrained for. The bailiff's fees, inclusive of fees of sale, amounted to \$7.20; and it was proved that the goods were bought in by the direction of John C. Hay, the president of the Rink company, on behalf of a gas company, of which he, Hay, and his brother were sole proprietors or partners. It also appeared that the Rink company was a duly incorporated company. It did not appear that any seizure was already made under the warrant of the 3rd August; but the month's rent was claimed.

The learned Chief Justice, after pointing out the connection of the purchaser with the landlords, the Rink company, and his connection with the Gas company, on whose behalf the purchase at the bailiff's sale

was made, told the jury: "Now the rule is, a man cannot both be a seller and a buyer. The landlord could not sell and buy the goods himself; it is against the rule of law. Mr. Hay was not there. The bailiff was there representing the landlord; and it was just the same as if the landlords themselves had been selling. What is said is, that Mr. Hay was really not a buyer in the case. He was one of the sellers. It was the Rink company that were the sellers. Mr. Hay was the president of that company at the time. It is said, although Mr. Hay bought in the goods, he bought them not as the president of the Rink company. He bought them not as a landlord, but he bought them as one of the Gas company. Well I do not think that makes any difference. I think that Mr. Hay was both seller and buyer." And again: "I am inclined to think that, although the sale was by him as one of the landlords, yet that his buying in at all even for the Gas company was setting up his own private interest to that extent against his interest and position as a member of the Rink company; and I think it was as objectionable in him to act in that way representing the two companies as though he had all the surplus after paying the rent instead of dividing it with his partners. I do not see any difference. I think his position was in conflict as a buyer with that as seller; and, in that case, the sale was wrong from beginning to end. It was a wrongful thing; a man has no right to deal in that way with another man's goods."

Mr. Maybee, counsel for the defendants made the following objection to this part of the charge: "I object to your Lordship telling the jury that Mr. Hay was both in the position of buyer and seller."

The learned Chief Justice left certain questions to the jury which, with their answers, were as follows:

(1) Did Howell tender the rent of \$50 or \$75 and the costs of the distress to the bailiff before the sale? Answer—Yes; he tendered \$75 rent and \$10 costs of distress.

(2) Was the floor, from the nature of Howell's business and the purpose it was put down for, the large sum it cost, and the period for which he had the place rented, and from the manner it was fastened, capable of being removed without injury to the rest of the building? Answer—It was.

(2a) If a landlord's fixture, what damage do you give the plaintiff for being deprived of the use of the floor for the rest of his term, that is, to the 18th November? No answer.

(2b) If a tenant's fixture, what damage do you give the plaintiff for being deprived of his floor, and the use of it to the 18th November? Answer—Tenant's fixture, \$200; loss of property, floor and skates, \$275. Total \$475.

3. Did the bailiff refuse or omit to give the plaintiff a copy of his demand for rent and charges? Answer—Yea.

4. If he did omit or refuse to give the plaintiff a copy of the demand, and of all costs and charges against him of the distress seized by the bailiff; and, if he did not make a valuation of the goods seized by two sworn appraisers, what damages do you give? Answer—\$1.

(5) What damages do you give the plaintiff for being dispossessed of the rink from the time of the distress made, until the sale? Answer—None.

(6) Did the defendants after the sale retain the possession of the rink? Answer—They did.

(7) Or did the defendants, by their seizure and sale and removal of the floor, prevent the plaintiff from taking possession or having the beneficial use of the premises for the rest of his term? Answer—Yes.

(8) If so, what damages do you give for such dispossession up to the time of sale?

(9) And, if so, what damages do you give against the defendants for the dispossession since the sale to the 18th November? Answer—The above sum of \$475, and the sum of \$50 for rent to the 18th July—\$525 covers all the damages. And they deducted from that \$50 for the rent up to the 18th July, leaving the sum of \$475 as net damage in the action.

In Easter Sittings, May 20th 1886, *Shepley*, obtained an order *nisi* calling on the plaintiff to shew cause why the verdict for the plaintiff, and the findings of the jury upon the questions submitted to them should not be set aside, and a new trial had between the parties, on the following grounds: (1) The findings are against law and evidence and the weight of evidence. (2) The distress in question was not shewn to be irregular or improper, and upon the evidence it was shewn not to be excessive. (3) There was no evidence to sustain any finding that the goods distrained upon were sold for less than their value. (4) Even assuming that only two months rent was due at the time of the distress and sale of the said goods, no more was realized than what was sufficient to satisfy such two months rent; and the defendants are entitled to justify the distress notwithstanding the same may have been made for more rent than was due. (5) The evidence failed to establish any case in the nature of a trespass by reason of the alleged tender by the plaintiff before the sale, the finding that such tender was made was clearly against the weight of evidence. (6.) Even if the tender was made, the refusal by the bailiff, the defendant Osborne, to accept the same, cannot make the defendants, the company, liable; and, whatever was done after such tender, was the individual act of the bailiff, for which the defendant company can be in no way responsible. (7.) The evidence showed also in respect of the flooring distrained upon, the same was not a tenant's fixture, but was either a chattel and therefore distrainable, or a landlord's fixture to which the tenant had no title, and of the taking of which he cannot complain. (8.) The evidence also shewed that the plaintiff had abandoned the possession of the premises in question, and he cannot therefore complain, either in respect of the alleged distress upon a tenant's fixture, or in respect of his exclusion from the enjoyment of the premises. (9.) The damages awarded the plaintiff are grossly excessive. If the whole damages awarded are in respect of the alleged wrongful distress, then the verdict cannot be sustained, because it is greatly

in excess of the value of the goods distrained. If the damages awarded are in respect of the case in the nature of the trespass attempted to be set up, then the same are largely in excess of the damages upon any estimation of them assessable for loss of occupation, profits, &c. (10) The learned Judge erred in telling the jury that as a matter of law it was not permissible upon the sale in question, that a business concern, in which some of the stockholders in a corporate company were interested, should become the purchasers.

Or why the said verdict and judgment should not be set aside and a verdict entered for defendants, upon the said findings, because the only finding of damages is in respect of the tenant for trespass, which under the circumstances, and for the reasons aforesaid, cannot be sustained.

During Michaelmas sittings, November 25th, 1886, *Shepley* supported the order. There was no tender here in point of fact. The tender also must be absolute and not conditional, whereas the tender here was conditional: *Richardson v. Jackson*, 8 M. & W. 298; *Matheson v. Kelly*, 24 C. P. 598. The tender must be before the impounding. Here tender was after the impounding: *Woodfall's L. & T.*, 13th ed., 414-6; *Johnson v. Upham*, 2 E. & E. 250; *Mayne on Damages*, 4th ed., 407-8. There was a sufficient impounding here: *Thomas v. Harries*, 1 M. & G. 695; *Swann v. Earl of Falmouth*, 8 B. & C. 456; *Tennant v. Field*, 8 E. & B. 336. The alleged tender to the bailiff and his refusal cannot affect the landlord. The wrongful act complained of is the sale after tender. The landlord cannot be held liable for the wrongful act of the bailiff. The warrant only authorizes the bailiff to do what is lawful: *Freeman v. Rosher*, 13 Q. B. 780; *Ferrier v. Cole*, 15 U. C. R. 561. The distraining for too much rent makes no difference where the goods sold do not realize more than the amount of rent due as was the case here: *McDonell v. Building and Loan Association*, 10 O. R. 580;

Bell v. Irish, 45 U. C. R. 167; *Baker v. Atkinson*, 11 O. R. 735. The floor was not a tenant fixture: *Woodfall* on L. & T., 623; *Brown* on Fixtures, 3rd ed., sec. 83 *et seq.* The plaintiff can only recover the actual damage sustained: *Shultz v. Reddick*, 43 U. C. R. 155; *Mayne* on Damages, 4th ed., 407-9. There was clearly misdirection in telling the jury the purchase by the Gas Company was in fact a purchase by the landlord.

Falconbridge, Q. C., *contra*. The question of tender was a question of fact for the jury. The jury have found that there was a tender, and there is ample evidence to sustain their finding, and therefore their finding cannot be interfered with. The tender was made within the five days before sale, and was therefore clearly legal. By the common law a tender had to be made before impounding, otherwise it was too late; but upon the equity of the statute 2 W. & M. sess. 1, ch. 5, sec. 2, an action is maintainable if the goods distrained are sold after a tender made within the five days allowed to the tenant to replevy, even though after impounding: *B. & L.*, 3rd ed., pp. 318-9, 321, 323; *Johnson v. Upham*, 2 E. & E. 250; *Ellis v. Taylor*, 8 M. & W. 415. The tender here was made within the five days. There was, however, no impounding here at all. The bailiff has authority to accept the rent, and a tender could legally be made to him. The cases shew that the landlord is responsible for all the acts of the bailiff except when they are wholly outside his authority, for instance where the bailiff distrains on the wrong person, or on goods privileged from distress. The warrant itself is the test of the question, and it contains due authority for the purpose: *Woodfall* on L. & T., 13th ed., 415-6; *Boulton v. Reynolds*, 2 E. & E. 369. The flooring was clearly a tenant fixture: *Brown* on Fixtures, 3rd ed., sec. 204; *Turner v. Cameron*, L. R. 5 Q. B. 306; *Ewell* on Fixtures, 3rd ed., 435. The damages were properly assessed: *Watson v. Lane*, 11 Ex. 769. The objection as to the purchase by the Gas company is not tenable.

December 24th, 1886. CAMERON, C.J.—The case presents several nice questions; and particularly the one presented by the objection to the learned Chief Justice's charge. I will consider them in the order in which they are taken in the order *nisi*.

As to the first objection, that the verdict and findings are contrary to law and evidence, the answer will depend upon the answer that must be given to the special objections taken by the rule on which the general objection to the verdict was based.

There was certainly evidence to go to the jury to justify a general finding for the plaintiff; as, putting aside for the moment the question whether there was a sufficient tender of rent and expenses before sale of the goods to constitute what was done thereafter a trespass, there was clear evidence that no notice of the distress in writing had been given as required by law, and there was no legal appraisal of the goods distrained before sale; and there was evidence that the actual value of the goods sold was greater than the amount due for rent, which would entitle the plaintiff to a general verdict for the difference in value of the goods and the rent.

The second objection to the verdict taken by the rule is, that the distress was not shewn to be irregular or improper, or for an excessive amount.

It is quite clear that at the time of the distress there was rent due for two months, whether it became payable on the first or eighteenth of the month. By the terms of the lease I think it must be held that the term was not to begin till the ice could be got off, and the time at which that could be done was the 18th April; but the first payment of rent was to be made on the first day of April. And as to the first rent it became payable before the term began; but there would not be a month's rent earned till the 18th May, and the second month's rent would become payable on the said 18th day of May, which would pay up to the 18th June; and so on. Thus on the 26th July, when the defendants distrained, there were two months rent due;

and, if lawfully conducted, the distress for that amount was not illegally made. Whether this objection is to prevail depends upon whether it was shewn that there was anything irregular or improper in the way in which it was conducted; and the answer I have given to the first question is also an answer to the second.

As to the third objection, that there was no evidence to sustain any finding that the goods were sold for less than their value. There was evidence that the roller skates, when purchased two months before, cost the plaintiff \$137.47, and that they were not much deteriorated in value, and the flooring cost him about \$187, and was worth, without the labour of putting down, from \$20 to \$30 a thousand or from \$160 to \$240 for the 8000 feet, the latter would be more than the cost. The whole sold and was purchased by the gas company for \$54.75. So, taking the property to be only worth half what it cost the plaintiff, its value to him would have been at least \$156 or three times nearly what it sold for.

The fourth objection is based on the assumption that the defendants would not be liable as the sale did not realize enough to pay the two months' rent and expenses. This assumption might be well founded, if the action was for an excessive distress merely; but that is only one item of the wrongs complained of by the plaintiff.

The fifth ground taken is, that there was no sufficient tender proved to make the defendants liable as trespassers. This objection does not go to the whole cause of action; but it raises an important question to be decided as it may be, if the defendants cannot be treated as trespassers but as only responsible for irregularities in the conduct of the distress, the damages awarded are excessive.

The case cited by Mr. Shepley of *Matheson v. Kelly*, 24 C. P. 598, is a strong case, and much like this in many features of the tender; but it is distinguishable, and the point of distinction is sufficient to make this tender conform to the formal requirements of a legal tender.

In *Matheson v. Kelly*, the plaintiff had the money in a drawer. He did not produce it; and there was a dispute as to the legality of a portion of the defendant's claim.

Here the money, if the plaintiff's evidence was to be believed, and the jury believed him, was shewn. It was \$87, which was more than sufficient to pay the rent and costs; for, putting the rent at \$75, and the costs at \$7.20, which was more than they then were, it would have overpaid.

The rule of law with respect to the sufficiency of a tender, as stated by Knight Bruce, L. J., in *Ex p. Darch, Re Farley*, 22 L. J. N. S. Bank., at p. 75, is: "That to constitute a legal tender the money must be there, and must be produced and seen; but with this exception, that a party to whom a tender is made may by his conduct relieve the debtor from the necessity of producing, by saying that it need not be produced, for he will not take the money if it be."

The other cases referred to by the learned Chief Justice of Ontario, when giving judgment as Chief Justice of the Common Pleas in *Matheson v. Kelly*, are to the same effect.

The only doubt I have is, the plaintiff does not say the bailiff saw the money. If it were closed up in his hand I do not see that the tender would be more complete than if the money were out of sight in a drawer.

The plaintiff's evidence believed would rather indicate that the money was open in his hand, and so visible; and, if the bailiff did not see it, it was because he did not care to see it; and it would be unreasonable to allow him to shut his eyes to the offer. If I were to act on my own impression of the evidence, I think I should hold that the tender was not made out; but I would accept the view that the plaintiff had the money, and was prepared to pay, rather than that contended for by the defendants. But whether there was a tender or not is a question of fact always, if there be legal evidence to be submitted to the jury; and I do not think the learned Chief Justice would, on the evidence in this case, have been justified in ruling there was

no evidence in support of the tender to be submitted to them.

If there was evidence, though wanting confidence in its weight myself, I am not at liberty to interfere with the finding of the jury, for I cannot say there is not evidence to support it; nor is the result one that reasonable men ought not to have come to.

There is perhaps a growing tendency in Courts to attach more importance to the inviolability of the verdicts of juries than formerly. I do not sympathise with the tendency, as the discretionary power of Courts to review and set aside the verdicts of juries, which has always been considered to exist, is a very important safeguard against wrong being done in the administration of justice, and one that I should be very sorry to see Courts abdicate or reject. At the same time I concede that it is most improper to interfere with the finding of a jury, unless it is abundantly manifest a wrong verdict has been rendered.

In the present case, on this question of tender, it is impossible to say with reasonable certainty that the jury did come to a wrong conclusion. If the conclusion was right then all the proceedings of the defendants after the tender were illegal, and they are responsible in damages for all the loss occasioned to the plaintiff by the wrongful sale of his goods, unless the defendants, the rink company, are not responsible for the act of the bailiff in refusing to accept the rent, as alleged in the defendants' sixth ground of objection taken by their rule.

There is nothing, I think, in this objection. The case of *Hatch v. Hale*, 15 Q. B. 10, is a clear authority against its validity.

In that case the warrant contained a direction not only to distrain but also to "*proceed for the recovery of the said rent as the law directs.*" This latter direction is not contained in the warrant in this case, but I do not see that its absence makes any difference in the legal rights of the parties.

Lord Campbell, C. J., in giving judgment, said, at p. 15 : "I think the law under which a bailiff is authorized to distrain for rent does not confer that power unless the bailiff has power given him at the same time to receive the rent. My opinion goes thus far; and I know of no authority to the contrary. And, where so extraordinary a power exists, this ought to be so. The party whose goods are taken should be enabled to release them at once by tender of the rent and costs."

Patteson, J., said, p. 16 : "I think that when the landlord gives an authority to distrain he necessarily gives an authority to receive the money. The warrant here was an authority to distrain; the power to receive necessarily followed."

Of like opinion were Wightman and Erle, JJ.; but the latter referred to the the authority contained in the warrant to proceed "as the law directs."

If I had never heard of an authority the matter to my mind would be wholly free from doubt.

The seventh ground of objection is directed only against the plaintiff's right to recover in respect of the flooring, which the defendants contend was not a tenant's fixture; but, if to be treated as a fixture and not a mere chattel, it was attached to the freehold and passed to the landlord by the act of affixing.

This question may not be free from doubt, as it may be questioned whether the proprietor of a skating rink is a person engaged in trade so as to make fixtures used in pursuit of his business, exempt from distress under the more liberal rule applied to fixtures for the purpose of trade. Looking at the purpose to which this building was put before it was let to the plaintiff, the short term the plaintiff was to hold the building, and the fact that the plaintiff intended to make money by allowing people to use the floor to skate upon in a way wholly different from the original design of the building, I think it must have been in the contemplation of the parties that the plaintiff was to be at liberty to remove the floor. The plaintiff ex-

pressly covenanted not to injure the floor existing at the time of the demise: that he would not use wooden or roller skates made of other material than rubber unless the said floor should be properly covered or protected by the plaintiff in such a manner that other rollers, if used, would not permanently injure the floor. This implies, I think, if the plaintiff covered the floor to protect it he would remove the covering and restore the floor to the condition in which he found it; and he was under a covenant, also, to leave the premises in repair, which he would not do by leaving the floor at a higher elevation than he found it.

I am therefore of opinion the flooring was properly found by the jury to be a tenant's fixture; and it follows, if it was a tenant's fixture, it was not liable to be distrained; that is, at all events, if not restorable in the plight in which it was before the distress: *Darby v. Harris*, 1 Q. B. 895.

The jury have found that this flooring could be removed without injury to the freehold; but they were not asked and did not find, whether it could itself, if removed, be restored in the same plight it was before distress; and, having regard to the decision in *Hellawell v. Eastwood*, 6 Ex. 295, 309, it might be necessary to send the case down again to get the opinion of the jury upon the point, though *Hellawell v. Eastwood* was decided on the ground that the machines there distrained were not fixtures. But in the opinion I have of the rights of the parties it is not important to consider whether this flooring was distrainable or not.

As the sale of the plaintiff's goods without appraisalment was such an unlawful act as to make the defendants liable for the value of the things taken and sold over and above the rent due; and, by reason of the tender of the rent, it is open to the plaintiff to recover not merely the difference between the rent and the value of the goods, but the whole damages sustained by him in consequence of his being wrongfully deprived of his goods, nothing would be gained by getting the opinion of a jury as to whether this flooring could have been restored in its former plight or not. There is no doubt that at the time of the tender it

could have been restored in its original condition, because it had not then been removed from its position. But that is not the test. The test is, assuming they are removed to be impounded, can they be restored in the same plight to the owner afterwards? Here there was evidence that flooring would be injured by the removal.

Biggins v. Goode, 2 Cr. & J. 364, is an authority for the position that under the operation of 11 Geo. II, ch. 19, the omission to appraise the goods distrained before sale, as required by 2 W. & M. Sess. 1, ch. 5, only entails the penalty of having to pay the difference between the actual value of the goods and the rent due. This is based upon the assumption that the distress being legal the landlord acquires a lien upon the distrained property for the amount of the rent due, and the interest therefore of the owner in the goods, is only the difference between their value and the rent.

This case was followed in *Knight v. Egerton*, 7 Ex. 407.

There is nothing in the defendants' eighth ground of objection. There was nothing in the evidence, to shew that the plaintiff had abandoned the premises. On the contrary it appeared he was only temporarily absent, and when he went away he left a person in charge.

The ninth objection to the plaintiff retaining his verdict is, that the damages are excessive. They do certainly seem larger than any actual loss sustained by the plaintiff as shewn by the evidence. Giving to the plaintiff the full value of his goods at the original cost to him, and allowing to him a rental of the place of \$50 a month, in excess of the rent he was paying, the amount would only be \$474. The evidence I think establishes that he would not at the end of his term have realized more than half the cost of the skates and flooring, say \$162; and, allowing to him the \$200 found by the jury as the value, as I understand their finding, of the occupation for the residue of the term, that would only come to \$362.00, and there was, I think, data in the evidence from which it could reasonably be said he would have earned \$200 over and above the \$75 he would

have had to pay for the three months rent. There is no doubt the jury were influenced in their award of the sum they found by the conduct of the defendants which seemed certainly harsher than there was in the circumstances any reason to think warranted by anything in the conduct of the plaintiff. At the time of the distress, though two months rent was payable, there had only been one month's occupation that was unpaid for, and then the claim for the third month's rent on the 3rd of August, when with no manner of fairness could there be a claim for that rent till the 18th August, caused the jury to regard the case of the defendants most unfavourably; and, if damages may be awarded as punishment, it cannot be said that the case was not one in which the jury would be justified in awarding damages punitive in character.

The tenth and last objection is directed against the learned Judge's charge; and is one that raises an important question, as to how far a corporator, or director, or officer of a corporation, may act on his own behalf in the purchase of property sold at the instance of the corporation; and how far other parties outside of the corporation have a right to complain of such purchase, when their property is being sold at the instance of the corporation. As at present advised I am inclined to think the learned Chief Justice laid down the law more broadly than it ought to be stated.

The sale was a sale by an entity, distinct in law from the members of the gas company, though the latter were, as individual corporators, a part of that entity. The sale was not a sale in any sense by the purchaser; and, in the absence of fraud, the bid by him increased the price of the goods, and thus benefited the plaintiff, whose goods were sold; and as the gas company and the rink company were two distinct entities, the rink company was not selling to themselves when they sold through their bailiff the plaintiff's goods to the gas company. And the reason why a landlord cannot buy goods sold at his own instance is that a man cannot be seller and buyer both; and when

such a sale takes place the property in the goods still remains in the tenant, and he has a right to maintain an action against his landlord if he claims to exercise any dominion over the goods sold in consequence of the sale.

This is the effect of *Williams v. Grey*, 23 C. P. 561, which was founded on *King v. England*, 4 B. & S. 782.

There being a sale and a purchaser, who is not the seller, I do not think any relationship between the seller and the purchaser short of the latter being the agent of the former to make the purchase, will avoid the transaction at the instance of the person whose goods are sold.

But I do not think the charge of the learned Judge entitles the defendants to a new trial, on the ground of misdirection, as the special findings of the jury are sufficient to entitle the plaintiff to retain his verdict, these findings being sustained by the evidence; and in making those findings the alleged misdirection would not have any prejudicial effect upon the jury.

It is a case in which Rule 311 of the Judicature Act applies and prohibits the granting of a new trial, as I cannot say that, in my opinion, any substantial wrong or miscarriage has been thereby occasioned in the trial of the action.

I am not aware that the effect of not giving a copy of the demand, and of all the costs and charges of the distress has ever been judicially considered in this country.

The provision is to be found in R. S. O. ch. 65, sec. 9 and R. S. O. ch. 136, sec. 16, and would seem to have been founded on or suggested by a like provision contained in the Imperial Act, 57 Geo. III. ch. 93, sec. 6.

The language of the clauses in our Acts is: "Every person who makes and levies any distress, shall give a copy of demand and of all the costs and charges of the distress, signed by him, to the person on whose goods and chattels the distress is levied."

In the Imperial Act it is: "That every broker or other person who shall make and levy any distress whatsoever shall give a copy of his charges, and of all the

costs and charges of any distress whatsoever, signed by him, to the person or persons on whose goods and chattels any distress shall be levied, although the amount of the rent demanded shall exceed the sum of twenty pounds."

Under the Imperial Act it has been held the clause only applies to the broker or person making the distress and not to the landlord, who does not interfere in making the distress further than by his warrant authorizing it to be made: *Hart v. Leach*, 1 M. & W. 560; and also that the delivery of the copy of the charges, &c., was not required to be made till after the sale. See the opinion of Gaselee, J., at the trial of *Hills v. Street*, 5 Bing. 37, 39.

The Imperial Act did not require a copy of the demand, while ours does.

I merely refer to the matter here, suggesting that our statute may also be limited to the delivery of the copy of the demand, and of the costs and charges after the sale, as the language is, "every person who makes *and levies* any distress"—not merely who makes any distress—the word "levy" being intended not merely to signify the act of seizure, but the whole proceeding including the sale of the thing distrained.

I do not think anything important turns upon this finding in this case.

GALT, and ROSE, JJ., concurred.

Order discharged.

[COMMON PLEAS DIVISION.]

LANGDON ET AL. V. ROBERTSON.

Carriers of goods—Contract—Principal and agent—Damages—Low rates—Public policy—Bill of lading—Foreign law.

The plaintiffs ordered goods from K., L. & Co., to be shipped to plaintiffs at Flat Creek, Manitoba, via the C. M., &c., Ry. Co., by which line plaintiffs had an arrangement for a special rate of freight, of which they informed K., L. & Co., but did not notify them of the terms thereof. K., L. & Co. delivered the goods to C. & M. at Montreal as agents of the defendant's line of boats consigned to the plaintiffs, to be sent by the said line of boats to M., and thence by the C., M., &c., Ry., and informed C. & M. of the fact of plaintiffs' having a special rate. The bill of lading which C. & M. gave for the goods was prepared by a clerk of K., L. & Co., who stated that he attached thereto a ticket marked "Ship our freight by C., M., &c., Ry. ; great bonded fast line ; low rates." The goods were carried by defendant's vessel, not to M., but to D., and thence by railway to their destination, and were accepted by plaintiffs, but plaintiffs had to pay higher freight than if carried as directed. The goods were carried from D. as quickly, or more quickly, than they would have been from M., and the freight would have been less had it not been for plaintiffs' special agreement with the C., M., &c., Ry. Co. The defendants' conduct in sending the goods by D. was proved to have been wilful.

Held, that there was a valid contract to carry via M., and that plaintiffs were entitled to recover for the breach thereof in not carrying therefrom ; but *Held*, [reversing the judgment of WILSON, C. J., at the trial], that the plaintiffs could only recover nominal damages.

Held, also, following *Friendly v. Canada Transit Co.*, 11 O. R. 756, that the plaintiffs were the owners of the goods, and entitled to maintain the action.

Held, also, that the contract for the low rate could not be assumed to be illegal, as being contrary to public policy, because lower than the ordinary local rates ; for even if it could not be enforced by plaintiffs against the company this would be no defence to the defendant.

Held, also, that the fact of the bill of lading having been made in the Province of Quebec, did not deprive plaintiffs of the benefit of R. S. O. ch. 116, for not only was this not set up by the pleadings, but also it did not appear that the Quebec law was different from that of Ontario ; and in the absence of proof it would be assumed to be the same.

THIS was an action tried by Wilson, C. J., without a jury, at Brampton, at the Spring Assizes of 1885.

The facts were as follows :

In May, 1882, Mr. Shepard, one of the plaintiffs, then being in Winnipeg, gave an order to the firm of Kirk, Lockerby & Co., of Montreal, through Mr. Lockerby then also being in Winnipeg, and subsequently a further order by an agent, for a considerable quantity of goods, directing

their shipment to the plaintiffs at Flat Creek, Manitoba, by Milwaukee, in the United States, and thence by the Chicago, Milwaukee and St. Paul Railway, by which line the plaintiffs had an arrangement for a special rate.

In fulfilment of this order, Messrs. Kirk, Lockerby & Co., delivered to Messrs. Currie & McLean at Montreal, as agents of the Western Express Line of boats, 82,113 pounds weight of goods consigned to the plaintiffs, to be sent by the said Express Line of boats to Milwaukee, and thence by the said Chicago, Milwaukee, and St. Paul Railway company. A clerk of Messrs. Kirk, Lockerby & Co., prepared the bill of lading which Messrs. Currie & McLean, gave for the shipment of the goods by the said line. Messrs. Currie & McLean caused the goods to be delivered to the steamer St. Magnus, owned by the defendants, and one of the Western Express Line of vessels, to be carried as directed to Milwaukee, at the rate of 16 cents per 100 pounds freight, and there delivered for further carriage to the said railway company; the freight to Milwaukee amounting to \$131.38 was paid by the shippers in advance. Currie & McLean made out the ship's manifest, and therein shewed the goods in question were to be carried to Milwaukee. Messrs. Kirk, Lockerby & Co., informed Messrs. Currie & McLean, that the plaintiffs had a special rate with the Chicago, Milwaukee, and St. Paul Railway Company; and the clerk swore that he got bills of lading from Currie & McLean and attached thereto tickets marked "ship our freight by Chicago, Milwaukee, and St. Paul Railway."

On these tickets also appeared the following words printed thereon: "Great bonded fast line, low rates, quick time."

Mr. McLean, of Currie & McLean, said he believed the special rate beyond Milwaukee was only mentioned incidentally, and that he believed he mentioned it to the captain of the boat, but would not swear positively he did. thought he mentioned it on the wharf—was almost positive he did, but would not swear to it.

The captain of the steamer denied positively that it was mentioned to him.

The goods were carried by the defendant's vessel not to Milwaukee, but to Duluth, and were there shipped by railway, not the Chicago Milwaukee, and St. Paul Railway, and safely reached their destination without delay, and were accepted by the plaintiffs. But they alleged they had to pay freight, amounting to the sum found by the learned Chief Justice, in excess of what they would have had to pay if the goods had been forwarded by Milwaukee.

It appeared that the distance by Milwaukee was greater than by Duluth to Flat Creek, by several hundred miles, and the ordinary rate of freight by the latter route was less than by the former. The excess in the amount of freight paid by the plaintiffs was only by reason of the alleged special agreement the plaintiffs had with the Chicago Milwaukee and St. Paul Railway Company, that they were injured by the goods having been sent by Duluth instead of Milwaukee.

The learned Chief Justice, after setting out the facts, found as follows:

WILSON, C. J.—It was said the property in the goods had not passed from Kirk, Lockerby & Co. to the plaintiffs at the time of the shipment of them at Montreal and at the time of their delivery at Duluth; and that Kirk, Lockerby & Co. were the proper persons to sue for the wrong delivery of the goods, if there was a wrong delivery, and not the plaintiffs.

There are three reasons why this objection must fail, Firstly, Mr. Lockerby, one of the firm of Kirk, Lockerby & Co., took the special order from the plaintiffs in Manitoba of the goods to be sent by Kirk, Lockerby & Co. from Montreal to the plaintiffs in Manitoba. That order, no doubt, was in writing, although I am not sure it was said to have been so by any one; but several telegrams were put in from the plaintiffs to the vendors directing the latter how to send the "bill of groceries ordered recently," and signed by the plaintiffs. Secondly, the goods did arrive at their destination and were accepted by the plaintiffs, and

they are the persons now entitled to sue in respect of them just as if they had been damaged through the default of the defendant. But, thirdly, the fact that the defendant has not set up the Statute of Frauds as a ground of defence is, besides the other reasons given, a conclusive answer to the defendant's objection.

I must hold that Currie & McLean were the authorized agents of the defendant to receive these goods for carriage, and to give the bills of lading which they subscribed, one of which was given to the master of the boat, one sent to the plaintiffs, and one was retained by Kirk, Lockerby & Co.

Upon each of these bills was the ticket attached to it by Mr. Bertram, the clerk of Kirk, Lockerby & Co., stating "Ship our freight by Chicago, Milwaukee, and St. Paul Railway," and the further words "low rates, quick time;" and the bills of lading had these tickets or stamps upon them when they were given, as before stated, to the master and to the plaintiffs, and when one of them was retained by the shippers, Kirk, Lockerby & Co.

Mr. McLean, one of the firm of Currie & McLean, said he made the contract, representing his firm; he acted as the agents of the defendant. They were shipped to be delivered at Milwaukee. He was told by Kirk, Lockerby & Co. there was a special rate from Milwaukee to the destination of the goods. He also said he believed he mentioned the fact of the special rate to the captain; was almost positive he did, but will not swear to it.

I must also hold the contract to have been according to the bills of lading, and the manifest, that the goods were to be delivered at Milwaukee for the plaintiffs; and, according to the tickets or stamps attached, that the goods were to be so delivered at Milwaukee, in order that the goods might be shipped by the Chicago, Milwaukee, and St. Paul Railway for the consignees. All that plainly appeared in and upon the bills of lading which were specially in the care of the master and purser of the vessel. And I find as a fact that the master, so far as his knowledge is of any consequence, did know the plaintiffs required their goods to be delivered to the particular company, the Chicago, &c., Railway Company, whose name was printed upon the ticket.

I hold the defendant to be answerable to the plaintiffs for the non-performance of his contract with them, that is, for any delay, expense, or trouble they were put to by

reason of their goods having been delivered at Duluth in place of Milwaukee.

I am not able to discover what loss, trouble, or delay they were put to by reason of such wrong delivery. It was not shewn the goods were longer on the road, or that there was any special damage sustained in consequence of that breach of the contract. The distance being about one-half that by Duluth which it was by Milwaukee, would lead one to presume that the rate from Duluth would have been lower, at any rate not higher, than by Milwaukee at the ordinary rate of railway charges, and also that the transit would be quicker.

The plaintiffs' claim, however, is substantially preferred, for the difference they have been made to pay, for full railway rates between Duluth and the destination, and for the special or low rate their goods were carried at from Milwaukee by an arrangement which they have made with the railway authorities; and to that claim the defendant makes two objections:

Firstly, that a special rate is void as being against public policy; and secondly, if the plaintiffs can get the benefit of it, that they cannot recover it at this time, because the defendant had no notice of the plaintiffs being entitled to such special rate.

The first objection is, that this contract is void, because it shews there were discriminative rates bargained for in a foreign country for the carriage of these goods.

The contract, it appears, was made by Mr. Shepard, one of the plaintiffs in the foreign country, with the officials of the railway companies which were to have carried these goods.

It is not shewn to have been an illegal contract where it was made and where it was to be performed.

It would be, if it were to be carried out here. There is nothing criminal in such a bargain.

In the *Great Western R. W. Co. v. Sutton*, L. R. 4 H. L. 226, at p. 237, Blackburn, J., in giving the judgment of the Judges, said: "The obligation which the common law imposed upon common carriers, was to accept and carry all goods delivered to him for carriage, * * * unless he had some reasonable excuse for not doing so, on being paid a *reasonable* compensation for so doing. * * * There was nothing in the common law to hinder a carrier from carrying for favoured individuals at an unreasonably low rate, or even gratis. All that the law required was, that he should not charge any more than was reasonable."

Then he shews a different provision of law in that respect was made when railways became the mode by which the work of common carriers was to be done.

I do not see any objection to the plaintiffs' recovering from the defendant the excessive freight they have been compelled to pay by reason of the goods being landed at Duluth instead of at Milwaukee, against the positive agreement of the parties, if the defendant can be charged with knowledge of that express contract.

It is proved beyond question that the plaintiffs informed the shippers, Kirk, Lockerby & Co., of the special rate the plaintiffs had with the railway companies for the carriage of their goods if landed at Milwaukee, and if carried over the Chicago, Milwaukee, and S. Paul lines, and it is proved that they attached the stamps or tickets to the bills of lading, one of which was upon such bill of lading before and at the time Currie & McLean signed such bills of lading for the carriage of the goods to Milwaukee; and that these tickets stated that the railway company named on the tickets carried the goods by their line at "low rates."

It was also proved that Mr. McLean of the firm of Currie & McLean, the shipping agents of the defendant at Montreal, was told by Kirk, Lockerby & Co., the plaintiffs had a special rate from Milwaukee.

He also said he believed, and he was almost positive, he told that to the master of the boat, but he would not swear to it.

The master swore positively he was not told of it. If I had to determine between the almost positive belief of Mr. McLean, and the positive denial of the master, I should more safely rely upon the statement of the former than upon the declaration of the latter, whose testimony was not at all satisfactory; and who, with the aid of the purser, altered the ship's manifest by changing the place of delivery from Milwaukee to Duluth; and who upon his return, upon informing Currie & McLean where he had delivered the goods, was told by them that he would get into trouble about it, denied having been so told, although they contradicted him in that respect, leaving the probabilities of that fact strongly against him.

It is sufficient, in my opinion, for this case, to shew that Currie & McLean, the defendant's agents, were informed of the fact that there were low railway rates for these goods from Milwaukee, without shewing the master also knew it. And these agents did their best to enable the plaintiffs to

get the special rates, for they gave the bills of lading and the manifest for the delivery of the goods at Milwaukee; and their acts were and are binding upon the defendant whose agents they were.

I do not believe any of the evidence on the part of the defendant which is opposed to the written terms of the bills of lading or of the manifest.

The term *low rates* on the tickets could not perhaps have been understood by the master or purser, or by Currie & McLean, the shipping agents of the defendant, and I am rather inclined to think they might not,—and besides their attention cannot be assumed to have been specially called to such words merely by their being on the ticket: *Candy v. Midland R. W. Co.*, 38 L. T. N. S. 226—but when Currie & McLean, whose right to sign the bills of lading the defendant said he did not deny, and who, as he said, had alone the right to sign them, and not the master, knew all about these words and their purpose and effect, it must be held that the defendant by putting the plaintiffs, by the act of his agent the master, to a greater expense than he knew through his agents he should have done in the transit of their goods, is answerable to them for the additional charges they have been obliged to pay by his breach of contract.

I find, therefore, for the plaintiffs; and I assess the damages in their favour to be paid by the defendant at the sum of \$381.68, the additional expense they have been put to by the wrongful delivery at Duluth instead of Milwaukee, and \$82.90 for interest upon the same from the 26th of July, 1882, when this excessive charge was paid, to this day, making together \$464.58; and I give the plaintiffs the costs of this action.

And I direct that judgment be not entered for one month, nor until the defendant's solicitor has had at least two weeks notice of this judgment, and of the plaintiffs' intention to enter judgment, in order that he may make any application he may be advised to make.

In Easter sittings, 1886, *MacKelcan*, Q.C., moved on notice to set aside the finding of the learned Chief Justice for the plaintiffs, and to enter judgment for the defendant, setting up a number of grounds, among them the following, which raise all the questions of law and fact presented by the case,

and are all that it is necessary to consider: 1. The judgment is contrary to law and evidence, and the weight of evidence; 2. The plaintiffs were not the owners of the goods in question, but the same were when carried by the defendant the property of Kirk, Lockerby & Co.; 3. That the contract for the carriage of the goods was made with Currie & McLean, and not with the defendant; 4. That the defendant received the goods from Currie & McLean to be carried according to their instructions, and he was responsible to them, and not to the plaintiffs, for any non-fulfilment of his obligation to carry and deliver the goods; 5. That no valid special contract between the plaintiffs and the Chicago, Milwaukee and St. Paul Railway Company for less rates than the ordinary freight charges was proved; 6. That such contract, if made, would be void, as being contrary to public policy; 9. That express notice should have been given to the defendant of any special damage or loss the plaintiffs would sustain through failure to deliver the goods at Milwaukee; 10. That the notice, if any, from the plaintiffs to Kirk, Lockerby & Co., of their special rates, was contained in a written communication not produced in evidence; and that no parol evidence of the contents of such communication should have been or can be admitted; and that therefore there was no legal evidence of a notice by the plaintiffs of the existence of such alleged special contract or of the terms thereof; and for an order reducing the verdict by the amount allowed for interest, no right to interest, or reasonable grounds for its allowance, having been established by the plaintiffs.

During Michaelmas sittings, 1886, *MacKelcan*, Q.C., supported the motion. The plaintiffs had not the property in the goods to entitle them to sue: *Coombs v. Bristol and Exeter R. W. Co.*, 3 H. & N. 510; *Benjamin on Sales*, 4th Amer. ed., secs. 140, 161, 181; *Smith v. Hudson*, 6 B. & S. 431; *Caulkins v. Hellman*, 47 N. Y. 449. The contract was with Currie & McLean as principals, not as agents; and cannot be ambulatory: *Coombs v. Bristol and Exeter R. W. Co.*, 3 H. & N. 515, 520. The circumstances show that Duluth

was intended by all parties as the port of delivery. The contracts with the American railways for special rates were not under seal or even in writing, and were not enforceable: *Hughes v. Canada Permanent, &c., Co.*, 39 U. C. R. 221; *Crampton v. Varna R. W. Co.*, L. R. 7 Ch. 562. Such a contract would be void as contrary to public policy; *Pierce on Railroads*, 498; *Hutchinson on Carriers*, secs. 297-303; *Great Western R. W. Co. v. Sutton*, L. R. 4 H. L. 226; *Audenreid v. Philadelphia and Reading R. W. Co.*, 68 Penn. 370. A comparison of the ordinary rates of both railways shows that the "low rates" ticket was only an advertising puff. It did not indicate a special contract. The captain or purser could not have contemplated that by landing the goods 313 miles nearer their destination they were subjecting the plaintiffs to heavier freight: *Candy v. Midland R. W.* 38 L. T. N. S. 226. There is no admissible evidence of the notice of special rates. It was mentioned merely incidentally. The defendant is only liable for such damages as may have been in the contemplation of the parties when the contract was made: *Ruthven Woollen Co. v. Great Western R. W. Co.*, 18 C. P. 316; *Hadley v. Baxendale*, 9 Ex. 341; *Horne v. Midland R. W. Co.*, L. R. 8 C. P. 131; *Irvine v. Midland R. W. Co.*, L. R. 6 Ir. 55 (1881); *Cunnington v. Great Northern R. W. Co.*, 49 L. T. N. S. 392; *Baldwin v. London, Chatham and Dover R. W. Co.*, 9 Q. B. D. 582; *British Columbia Sawmill Co. v. Nettleship*, L. R. 3 C. P. 499. Unless the railways were bound to carry from Milwaukee at special rates, no damages based on them can be recovered: *Hart v. Baxendale*, 16 L. T. N. S. 390. There is no legal proof that plaintiffs were compelled to pay higher rates.

Murphy, contra. The consignees are properly plaintiffs. The ultimate receipt and acceptance vested the property in the plaintiffs from the delivery by the consignors to the carrier. With the property went the right of action: *Friendly v. Canada Transit Co.*, 10 O. R. 756, 764; *Kibble v. Gough*, 38 L. T. N. S. 204; *Page v. Morgan*, 15 Q. B. D. 228. The Statute of Frauds has not been pleaded, and

cannot be urged now: O. J. A. Rule 141; *Clarke v. Callow*, 46 L. J. N.S.Q.B. 53. Currie & McLean were general agents of the defendant with the widest authority. He has accepted and ratified their contract: *Trueman v. Loder*, 11 A. & E. 589; *Benjamin on Sales*, 4th Amer. ed., ss. 237, 238; *Christie v. Burnett*, 10 O. R. 609. The defendant is chargeable to the extent that Currie & McLean, the captain and purser would be if they were principals: *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Moss v. Bettis*, 13 Amer. R. 1; *Mulligan v. Illinois Central R. W. Co.*, 14 Amer. R. 514; *Browne on Carriers*, Amer. ed., sec. 622. The plaintiffs' agreement with the managers of the railway companies for rates was valid without writing: *Church v. Imperial Gas Light Co.*, 6 A. & E. 846, 861; *Henderson v. Australasian Royal Mail Steam Navigation Co.*, 5 E. & B. 409; *South of Ireland Colliery Co. v. Wadille*, L. R. 4 C. P. 617; *Wood's Railway Law*, sec. 165, pp. 450-451. The agreement was found as a fact at the trial. The defendant is not entitled to raise the objection even though it could have been raised by the railway companies, for they were not bound to raise it: *Bournemouth Commissioners v. Watts*, 14 Q. B. D. 87. There was nothing contrary to public policy in the agreement for special rates. No unequal preference was shewn. It is discrimination exercised to the injury of a person which gives the right to complain: *Garton v. Bristol and Exeter R. W. Co.*, 1 B. & S. 112, 160. The direction of the goods by the particular route was clear. Disregard of it was at the carrier's peril. He became an insurer by attempting to carry otherwise: *Hutchinson on Carriers*, secs. 310-314, and cases cited. There was sufficient notice to the defendant of the special rate to charge him for preventing plaintiffs from having the benefit of it. McLean was informed of it. It is the most prominent fact he remembers. His positive belief is, that he spoke to the captain about it. He told the captain and purser when they came back they would get into trouble for delivering wrongly at Duluth. The parties, their business sense, their strict instructions, their conduct, all shew that they understood the reason of the direction. The

ultimate destination, Flat Creek, was plain, both by the bills of lading and from previous similar shipments. The ticket on the bills was an additional notice of the low rates. Evidence of railway experts was offered at the trial as to what must have been in the contemplation of the parties; but it was dispensed with, his Lordship holding that the ticket attached would bear the construction that it meant something less than usual rates, to put the parties upon notice to enquire what the low rates were. The defendant was not bound, like a railway company, to accept the goods. He might have declined them; but he undertook liability for proper performance of his contract, knowing the consequence of a breach. The damage sustained was the primary, immediate and necessary result of the breach. It was certain and not speculative. We are well within the rules formulated in *Hadley v. Baxendale*, 9 Ex. 341, to recover. The following cases were also referred to: *Simpson v. London and North-Western R. W. Co.*, 1 Q. B. D. 274; *Jameson v. Midland R. W. Co.*, 50 L. T. N. S. 426; *Mayne on Damages*, 4th ed., pp. 16, 40, and cases there cited; *Sawdon v. Andrew*, 30 L. T. N. S. 23; *McMahon v. Field*, 7 Q. B. D. 591; *Waters v. Towers*, 8 Ex. 401; *Grèbert-Borgnis v. Nugent*, 15 Q. B. D. 85; *Ellbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473; *Cussaboglou v. Gibbs*, 11 Q. B. D. 797. In *Horne v. Midland*, L. R. 8 C. P. 131, there was no notice of the special price. The rule, that notice of a fact cannot increase the liability of a carrier unable to decline freight, is not applicable. In determining the liability of a party for consequences which have resulted from his default, the law imputes to him a contemplation of those consequences which would have been present to his mind, if he had, when making the contract, contemplated the consequences of the particular breach which has occurred. The "special rate" was not a "special circumstance." Like rates were necessarily open to all shipping under like circumstances. The presumption is that the railways acted legally: *Vickers Express Co.*

v. *Canadian Pacific R. W. Co.*, 9 O. R. 251; *Scofield v. Lake Shore and Michigan R. W. Co.*, 43 Ohio 57, 54 Amer. R. 46. Interest is properly allowed: *Edwards v. Great Western R. W. Co.*, 11 C. B. 588; *Mayne on Damages*, 4th ed., 150; *Dyment v. Northern &c. R. W. Co.*, 11 O. R. 343.

December 23, 1886. CAMERON, C. J.—The learned Chief Justice found as facts that Currie & McLean were agents for the defendant, authorized to make the contract contained in the bills of lading; and the defendant had notice through their agents Currie & McLean, that the plaintiffs had a special rate with the Chicago, Milwaukee, and St. Paul Railway Company; and also, in his opinion, such notice was given to the captain of the defendant's vessel, though positively denied by the captain.

It was not alleged or proved that there was any notice to Currie & McLean more specific than that the plaintiffs had a special rate with the Chicago, Milwaukee, and St. Paul Railway.

As to the first ground of motion, assuming there was a contract between the plaintiffs and defendant to carry the former's goods to Milwaukee, it was clearly broken, and the plaintiffs were entitled to judgment for at least nominal damages, as it is beyond dispute that the goods were not so carried: *Sanquer v. London and South-Western R. W. Co.*, 16 C. B. 163. There was such a contract if Currie & McLean were agents of the defendant to make the contract; and the finding of the learned Chief Justice that they were the defendant's agents is abundantly supported by the evidence.

Upon the second ground I think the finding is equally free from objection. The plaintiffs were the owners of the goods, whether they ordered them in writing or orally. At least as far as I am concerned the case of *Friendly v. Canada Transit Co.*, 10 O. R. 756, precludes me from holding otherwise; as in that case I held that by the acceptance of the goods the property became vested in

the purchaser from the time of their delivery to the carrier, and whatever right of action the seller had under the bill of lading in respect of the goods up to the time of acceptance, passed upon acceptance by the purchaser, to him.

The third and fourth grounds are answered by the answer to the first, that Currie & McLean were in the transaction the agents of the defendant, and were not contracting on their own behalf.

Upon the fifth and sixth grounds, which present the same question in different ways, Mr. Shepard, one of the plaintiffs, swore that he had made an arrangement for a special low rate of freight with the Chicago, Milwaukee, and St. Paul Railway Company, to transport sugar in car loads at seventeen and a half cents per hundred pounds, and other goods at thirty cents per hundred pounds; and also with other railways from Milwaukee and Chicago to St. Paul; and with the St. Paul, Minneapolis and Manitoba Road to take goods from St. Paul and Minneapolis to St. Vincent.

The statement of the plaintiff Shepard was not contradicted; and uncontradicted it establishes the existence of a contract between the railway company and the plaintiffs to carry at the rates designated; and it cannot be assumed that it was an illegal or invalid contract from the mere fact that ordinary local rates by the same railway were higher, and the contract was executory and not in writing. It was made with the general freight agent of the company.

This is not a contract that the railway company is trying to enforce against the plaintiffs, or the plaintiffs against the railway company; in which case more might be required to be proved. Here a contract existed in fact whether valid in law or not; and if the defendant had sufficient notice of its existence, and contracted with the plaintiffs in reference thereto, he cannot be permitted to say, to relieve himself from the consequences of his own breach of contract, the plaintiffs were not damnified because they could not have enforced their contract with the company.

The case cited by Mr. MacKelcan of *Hart v. Bazendale*, 16 L. T. N. S. 390, in support of his contention, falls very far short of doing so. The action was against the defendants as carriers for not delivering goods in a reasonable time and safely. The plaintiff in the action received an order for a washstand with marble top from a Mr. May, to be supplied within a week, and on the same day he wrote to a cabinet maker to supply the same. The latter put the stand and marble top in separate boxes and sent them to the carriers, to be taken by them to a railway station to be forwarded to the plaintiff. On the arrival of the boxes at the station it was found that the box containing the marble top rattled, and the railway officials on this account refused to receive it. The stand was forwarded to the plaintiff who refused to accept it. The marble top was taken back by the defendants to the cabinet-makers, with instructions to repair it. When repaired, it was sent with the stand to the plaintiff, who at first refused to accept them, but afterwards did so under the advice of his solicitor, who advised him to sell them by auction, which he did at an expense of 8s. 6d. The price of the article ordered from the cabinet-maker was £5 10s., and the price expected for it from May, the purchaser, was £7 10s. The net proceeds of the sale by auction were £2 15s. May had not agreed to pay any fixed price.

Martin, Baron, said to counsel, "What damage has the plaintiff sustained?" To which counsel replied: "Mr. May refused to take the goods which had been ordered." Baron Martin said: "Nothing can be made out of that, because he was under no contract to purchase. You must prove a contract with Mr. May that he should buy at a fixed price."

There was no question here of the validity of the contract. It was not a contract that required to be evidenced by a writing, as the amount was under £10; and the remark of the learned Baron had reference to the necessity of shewing an agreement to pay a fixed price to give a measure for the assessment of the damages.

The objection, therefore, presented by this ground, is not entitled to prevail.

The greatest difficulty in the way of sustaining the plaintiffs' right to retain their judgment in its entirety, is presented by the ninth ground taken, namely, that the defendant had not sufficient notice of the contract of the plaintiffs with the Chicago, Milwaukee, and St. Paul Railway Company to make him liable for the larger amount of freight paid by the plaintiffs by reason of the defendant's misdelivery of the goods.

Looking at the language of the bill of lading, the undertaking of the defendant through his agents Currie & McLean was simply to carry the goods to Milwaukee and there deliver them to the consignees or their agent there to receive them.

It is from matters outside of the bill of lading that the ultimate destination of the goods is ascertained.

The bill of lading itself is as follows, as far as it is important to be considered: "Shipped in good order and condition by Kirk, Lockerby & Co., of Montreal, and consigned to Langdon, Shepard & Co., in and upon the Steamboat Western Express Line, whereof ——— is master for this present voyage, and now lying in the Port of Montreal. Being marked and numbered as per margin, and are to be delivered in like good order and condition at the port of Milwaukee." Then follow the date and description of goods and the mark [L. S. & Co.,] Flat Creek, Manitoba, and the signature of the defendant's agents Currie & McLean.

When Currie & McLean signed the bill of lading, the goods had not been placed on board the defendant's vessel. It is dated 27th June, 1882. But on the 30th June, the goods were put on board, and the ship's manifest of the shipment was as follows: "Western Express Line. Shipped in apparent good order and well conditioned by Currie & McLean, as agents and forwarders for account and risk of consignors or owners of property on board the Propeller Saint Magnus, ———, master, the following articles, marked as per margin, and to be delivered in like good order and condition * * unto the consignees named in the margin or to their assigns."

Then follows, under head of marks, consignees, &c., the names of the plaintiffs thus, "Langdon, Shepard & Co., Flat Creek, Manitoba, care of Chicago, Milwaukee, and St. Paul Railway, Milwaukee."

Under the bill of lading there might be a question whether the defendant assumed any responsibility as to forwarding the goods beyond Milwaukee.

But that consideration is not of importance in this case as the plaintiffs' claim is based on the non-delivery of the goods at Milwaukee, where, according to the terms of both bill of lading and manifest, they should have been delivered; and the only question really is, what damages are the plaintiffs entitled to. That depends upon the proper solution of the question, had the defendant, as already stated, sufficiently specific or precise notice of the plaintiffs' arrangement with the Chicago, Milwaukee and St. Paul Railway Company to make him liable to the plaintiffs for the extra freight paid by them by reason of the goods not having been carried to Milwaukee, and thence forwarded by that railway to Flat Creek?

If the case of *Horne v. Midland R. W. Co.*, L. R. 8 C. P. 131, is to be treated as not overruled, the notice to Currie & McLean cannot be regarded as sufficient.

In that case the plaintiffs had delivered to the defendants, a railway company, a large quantity of shoes, with notice if not delivered at the time mentioned, they would be thrown back on their hands. The plaintiffs had a contract with the consignees to supply the shoes by the specified time at a price exceeding their market value of one shilling and three pence a pair. The shoes were not delivered by the defendants in time, and the purchasers refused to accept the shoes. It was held in the Exchequer Chamber, confirming the judgment of the Court of Common Pleas, by Kelly, C. B., Justices Blackburn and Mellor, and Barons Martin and Cleasby, that the defendants were not liable. Mr. Justice Lush, and Baron Pigott dissenting.

It may be said that notice that the shoes would be thrown back on the plaintiffs' hands was not an intimation

that there was any higher price to be paid for the shoes than the ordinary market price ; while, in the present case, the notice was of a contract for a special rate, which would be understood by a carrier to mean less than the ordinary rate. But still it was only after all an intimation that the rate was lower than that particular company's ordinary rate, not that it would be less than the rate from a point where the land carriage was much shorter and the ordinary rate considerably less than that by rail from Milwaukee.

In *Die Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473, the defendants contracted with the plaintiffs to furnish 666 sets of wheels and axles at stated intervals. The plaintiffs were under contract with a Russian Railway Company to deliver them 1000 waggons, 500 on the 1st May, 1872, which was after the time at which the last delivery by the defendant Armstrong was to be made, and 500 on the 31st May, 1873, and the plaintiffs were bound to pay the railway company two roubles per waggon for each day's delay. In the course of the negotiation between the plaintiffs and Armstrong, the latter was informed of the contract with the Russian company, but neither the precise day for the delivery, nor the amount of the penalties. Armstrong delayed in delivering a hundred sets of wheels, and the plaintiffs had to pay penalties.

The Russian company, though entitled to 200 roubles, accepted £100. The plaintiffs sued Armstrong to recover that sum. It was held the plaintiffs were not entitled to the amount of the penalties as damages as matter of right ; but that the jury might, under the circumstances, reasonably have assessed the damages at that amount. It was so held in consequence of the impossibility of the plaintiffs obtaining wheels to enable them to fulfil their contract ; and thus, as I understand the rule in such circumstances, the jury are not confined to nominal damages, but may, without there being any precise measure to guide them, give what in their judgment is reasonable.

The judgment of the Court was delivered by Blackburn, J., for Cockburn, C. J., Lush and Quain, JJ.

In his judgment, at p. 477, he said: "At all events the plaintiffs were entitled to recover at a rate per day equal to whatever the jury should find to be reasonable compensation for loss of the use of the wagons: see *Cory v. Thames Ironworks Co.*, L. R. 3 Q. B. 181. We think therefore, it would have been a misdirection if the jury had been directed to find no more than nominal damages. We have had more difficulty in determining whether the plaintiffs are entitled to keep the verdict for the amount as it stands. If we thought that this amount could only be come at by laying down as a proposition of law that the plaintiffs were entitled to recover the penalties actually paid to the Russian Company, we should pause before we allowed the verdict to stand."

Again on page 478 in reference to the case of *Hadley v. Baxendale*, 9 Ex. 341, he said: "And so far as the case decides that the defendant is not liable for any unusual consequences, arising from circumstances of which he has not notice, the case has often been acted upon. But an inference has been drawn from the language of the judgment, that whenever there has been notice at the time of the contract that some unusual consequence is likely to ensue if the contract is broken, the damages must include that consequence; but that is not, as yet at least, established law."

And quoting still further from his language at the foot of the same page: "We are not aware of any case in which *Hadley v. Baxendale* has been acted on in such a way as to afford an answer to the learned author's doubts." (This refers to the doubts of Mr. *Mayne* in his work on *Damages* p. 10, 2nd ed., by Lumley Smith); "and in *Horne v. Midland R. W. Co.*, L. R. 8 C. P. 131, much that fell from the Judges in the Exchequer Chamber tends to confirm these doubts. But we do not think it necessary here to decide any such question."

The latest English case I have met with is that cited on the argument of *Grébert-Borgnis v. Nugent*, 15 Q. B. D. 85, in which the case in L. R. 9 Q. B. 473, from which I have made the above copious extracts, is approved of.

It appears to me the opinions of the Judges in this case shew that more must be established than has been shewn to entitle a party to recover as damages what he has lost through his own breach of contract, caused or brought about by the failure of the defendant to perform his obligation.

Brett, M. R., at p. 89, thus states his opinion of the result of the cases cited on the argument, supposed to carry out the principles of *Hadley v. Baxendale*: "Where a plaintiff under such circumstances as the present is seeking to recover for some liability which he has incurred under a contract made by him with a third person, he must shew that the defendant at the time he made his contract with the plaintiff, *knew of that contract, and contracted on the terms of being liable if he forced the plaintiff to a breach of that contract.* If such sub-contract was not made known to him at all, the defendant cannot be made liable for what the plaintiff has had to pay under it. If there be no market for the goods, then the sub-contract of the plaintiff, although not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to shew what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value. But where the sub-contract was fully made known to him in all its terms, in my opinion the defendant would be liable; and the proper inference and one which the jury might infer, would be that he had contracted with the plaintiff upon the terms that if he broke his contract he should be liable for all the consequences of a failure by the plaintiff to perform his sub-contract. Still, however, it seems to me, according to what has been decided, that the original vendor, in such a case as this, is only to be liable, in the case of a breach of contract, for the natural consequences of so much of the

sub-contract as was made known to him." Then putting a suppositional case, he adds: "It seems to me that the cases establish that the original vendor is to be liable to so much of the sub-contract as was made known to him, but only to that extent."

Bowen, L. J., at page 92, said: "A person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract. That is the principle really at the bottom of *Hadley v. Baxendale*, 9 Ex. 341. Now, how much of the damages claimed may reasonably be supposed to have been in the contemplation of the parties at the time of making the contract, depends in every case upon how much of the real situation of the parties was so disclosed by the purchaser to the vendor at the time the contract was made, as to render it a fair inference of fact that damages of that class were intended to be recouped if they were suffered."

The evidence in the present case, with respect to notice of the plaintiffs' contract, amounted to no more than this: Mr. Shepard, one of the plaintiffs, visited Montreal in February or March, 1882; and then in another memorandum, not proved or produced at the trial, instructed Messrs. Kirk, Lockerby & Co. as to the existence of the plaintiffs' special contract with the railway company by which the goods in question should have been forwarded. It did not appear that Kirk, Lockerby & Co., were informed of the special terms made, or of more than that there was a special rate.

Mr. McLean, one of the firm of Currie & McLean, swore the goods were simply ordered to be delivered at Milwaukee. "The only special circumstance or reason that I know of was what I was told by Kirk, Lockerby & Co., that there was a special rate from Milwaukee to destination. There was no communication or notification other than I have mentioned as being told me by Kirk, Lockerby & Co. There were stamps on the bills of lading when I signed the rate, which are the stamps which I now see on the bills."

On cross-examination, in answer to the question : "You stated that the special rate beyond Milwaukee was mentioned only incidentally?" He said : "I believe it was. I do not remember that they laid any stress upon it. It was immaterial what the rate was beyond. I took the freight to be carried to Milwaukee. I did not think any more about it. I believe I mentioned it to the captain of the boat. I would not swear positively that I did; but I believe that I did. I think I remember mentioning it on the wharf. That is my recollection of it. I am almost positive that I did; but I would not swear to it."

Can it be reasonably inferred from this evidence that it was in the contemplation of Currie & McLean (whose contemplation must, I think, be taken to be that of the defendant), and of Kirk, Lockerby & Co., that if the goods were not forwarded by the Chicago, Milwaukee, and St. Paul Railway the defendant would be bound to make good any loss that might be occasioned to the plaintiffs thereby; or that the cost of transport by Duluth, a much shorter distance and from which the ordinary rate is less, would be greater than by Milwaukee? The main object of the contract was, that the goods should be carried not to Milwaukee merely but to Flat Creek, when the evidence, outside of the bill of lading, prepared by Kirk, Lockerby & Co., is considered; and the bill of lading also shews, though the contract expressly undertaken by it was only to carry to Milwaukee, the goods were addressed to the plaintiffs at Flat Creek.

The measure of damages furnished by the evidence is either nominal or the full amount paid by the plaintiffs in excess of the amount they would have paid under the special rate they had contracted for. But the last measure can, I think, only be adopted, without disregarding *Horne v. Midland R. W. Co.*, L. R. 8 C. P. 131, on the assumption the evidence establishes the defendant had notice of the terms of the special contract, and contracted with the plaintiffs in reference thereto, as Brett, M. R., puts it in *Grébert-Borgnis v. Nugent*, 15 Q. B. D. 85, in the extract I have above made from his judgment.

The evidence, to my mind, clearly establishes that the defendant, not negligently but wilfully, sent the goods by Duluth instead of Milwaukee, but they reached their destination as quickly or more quickly than they would have done by Milwaukee, and also for less freight, were it not for the plaintiffs' special agreement with the railways running from Milwaukee. By his wilful disregard of his contract he should properly be held responsible for all damages that, under the law, may reasonably be awarded against him; and, if he had sufficiently specific notice of the plaintiffs' contract so that it might fairly be assumed the contract he made to carry the goods was made in reference to that contract, the sum awarded by the learned Chief Justice would be the correct amount.

The defendant has objected that under no circumstances are the plaintiffs entitled to interest. But by the defendant's improper breach of his contract the plaintiffs paid a large sum of money, which, if they are entitled to recover from the defendant, the defendant ought to have repaid them immediately, and the defendant has had the use of the money, he ought so to have paid over, since, and the plaintiffs have lost its use. So in fairness the plaintiffs should be allowed interest as an enhancement of the damages.

Mr. MacKelcan on the argument objected that the plaintiffs had not the right to recover because the bill of lading on which the plaintiffs' action is based was made in Quebec, out of the Province, and the bill therefore has only the effect it would have had by the custom of merchants previous to the Act of this Province 33 Vic. ch. 19; R. S. O. ch. 116, as that Act cannot apply to the Province of Quebec.

This contention is not entitled to prevail as the defendant has not pleaded that the contract was made in Quebec, nor has he proved that the law of Quebec is different from the law in this Province; and, in the absence of such proof, it must be assumed to be the same: *Toponce v. Martin* 38 U. C. R. 411.

The present Chief Justice of the Queen's Bench Division in delivering the judgment in that case at p. 429 says: "But when we adjudicate upon foreign law we adopt for the occasion that law [as part of our own law, and we may act on the law of the foreign country being the same as our own in this respect, unless it be averred and shewn to be different, and it is for the person setting up such difference to establish it."

For this opinion a number of authorities are cited, which directly, or by inference, fully sustain it. If the evidence shewed what the law of Quebec was on the subject an amendment of the pleadings might be allowed; but as it is there is nothing to amend by.

In this connection it may be remarked that the plaintiffs do not in their statement of claim aver that the defendant had notice of the special contract in respect of which their special damage is claimed, which they ought to have done.

The objection to the evidence of the plaintiff Shepard as to his instructions to Messrs. Kirk, Lockerby & Co., concerning the special rate, is, perhaps, well taken, those instructions having been sworn to have been in writing. But what those instructions were is unimportant, as the plaintiffs' right does not depend upon what the plaintiffs instructed Messrs. Kirk, Lockerby & Co., but on what Messrs. Kirk, Lockerby & Co. gave the defendant through his agents notice of. The plaintiffs sue on the contract made by Kirk, Lockerby & Co. by the bill of lading, by virtue of R. S. O. ch. 116, sec. 5.

The result of my opinion is, the plaintiffs' judgment should be reduced in amount to nominal damages; but as the defendant was guilty of a wilful breach of his contract, the plaintiffs ought not to pay costs; and judgment should be entered for the plaintiffs for one shilling damages, without costs to either party.

GALT and ROSE, JJ., concurred.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

THE MERCHANTS' BANK V. LUCAS ET AL.

Bill of Exchange—Forgery—Estoppel by conduct.

Y. who had been in partnership with the defendants, L. and J. M. Y., under the name of the H. C. Co., withdrew from the firm and assumed the position of general manager; but had no power to sign drafts. On 25th June, 1883, Y. for his own private purposes drew a bill of exchange in defendants' name, on M. & Co., a firm in Montreal, for \$2,760, which was discounted by the plaintiffs and sent to Montreal. The bill was to mature on 28th September. About 25th August Y. requested the bank to recall the bill, as he said the company were settling with M. & Co. On the same day Y. wrote defendants informing them of the fact of his having so used their name on the draft, and requesting them to retire and charge the same to his account, stating that as it had been discounted for his own accommodation, and the proceeds applied to his own use, defendants should pay no part of it. On 27th August the defendant L. called at the bank and asked to see the draft, and examined it very critically, and when asked why he did so, said, "J. M. Y.'s signature was not usually so shaky," and that he would call in a day or two to see if the bill were taken up. A few days afterwards J. M. Y. called at the bank and asked to see the bill and examined it very carefully. The acting manager asked him if he would send a cheque for it, when he answered that it was too late that day, but he would do so next day. No cheque was sent. About the 15th September, the acting manager and the bank solicitor called to see J. M. Y., and asked him why he had not sent his cheque, when he replied he did not know, but admitted having promised to do so, and that he thought at the time he would. He refused to say whether the signature was his. Y. subsequently left the country. About the time the draft was returned to the bank, and shewn to L., Y. had a large sum to his credit with the firm, and continued to have, even after the commencement of this action. The Judge at the trial found that the draft was a forgery, and gave judgment for the defendants.

Held, [ROSE, J., dissenting] that, although the draft was a forgery, the defendants by their conduct were estopped from denying their liability on it.

Per CAMEBON, C.J., and GALT, J. There need not be affirmative evidence that by reason of defendants' conduct the plaintiffs were prejudiced by the actual doing of something they would not have done, or refrained from doing something they would have done; but it is sufficient if they can shew in the absence of matter of estoppel that they might have put themselves in a position from which a benefit might accrue to them. It is immaterial whether they would have taken steps to secure the benefit or not. Here the plaintiffs might have arrested Y. for forgery and have sued him for the money obtained, and thereby placed themselves in a better position with regard to Y. than they were afterwards.

Per ROSE, J. There should have been affirmative evidence that the plaintiffs were so prejudiced.

ACTION on a bill of exchange for \$2,760, drawn by defendants trading in Hamilton under the name of the Hamilton Cotton Company, on McElderry & Co., of Montreal,

and discounted by the Merchants Bank at Hamilton for the drawers.

The defence was, that they did not draw the said bill, claiming that it was a forgery.

The cause was tried before Galt, J., without a jury at Hamilton, at the Winter Assizes of 1886, who found in favour of the defendants.

The finding of the learned Judge was as follows :

"I give judgment in favour of the defendants, with costs. I find that the draft in question is a forgery, but in moving you may take any rule you please, and I will tell the Court the case was not argued here."

In Hilary sittings, *E. Martin*, Q.C., moved on notice to set aside the judgment entered for the defendants and to enter judgment for the plaintiffs, on the ground that it was contrary to the weight of evidence; and on the ground that the defendants or one of them drew and endorsed or ratified and confirmed the said bill of exchange sued on, and agreed to pay the same; and on the ground that the defendants are estopped by their conduct from denying the validity of the bill of exchange sued on and cannot now set up as a defence that the same was forged as alleged.

During the same sittings, February 18, 1886, *Robinson*, Q. C., and *E. Martin*, Q. C., supported the motion. There was no forgery proved, although the learned Judge at the trial has found that the defendants' signature was forged. There is a difficulty in disputing such a finding of fact by the learned Judge who had all the witnesses before him; but still the plaintiffs contend most strongly that the weight of evidence shews that the signature was genuine. Assuming that the signature was a forgery, then there was either ratification or estoppel. There was clearly estoppel here. There is no dispute on the authorities that if a person's signature to a note is forged, and such person by his conduct induces the holder to believe the signature to be his, and the holder

thereupon changes his position, the person whose signature has been forged, is estopped from denying that it is his signature: *Knights v. Wiffen*, L. R. 5 Q. B. 660, 665-7; *Bigelow* on Estoppel, 4th ed., 542, 549; *Dezell v. O'Dell*, 3 Hill, N. Y. 215. There was however, ratification; and this may take place without any change in the position of the holder. Thus where there has been a forgery, and the person whose signature has been forged has his attention called to the signature, and he admits the signature to be his and promises to pay, there is thus ratification and adoption of the signature, and the person is liable thereon. This is the position of the defendants here. The principle laid down by the cases is, that a person in such a position is not bound to say anything; but when he does say anything he is bound by what he says: *McKenzie v. British Linen Co.*, 6 App. Cas. 82; *Morris v. Bethell*, L. R. 5 C. P. 47; *Daniel* on Negotiable Instruments, 3rd ed., sec. 1351-3. The conclusion of American writers is rather against this doctrine. The authority given is, *Workman v. Wright*, 31 Amer. 546, 33 Ohio 405, which proceeds on the ground that ratification is not good unless there is a new consideration therefor; but this point was not necessary for the decision of this case. It appeared in that case that when the defendant ratified the signature he mistook the note for another note which he had signed. The decisions of the Courts of New York and Massachusetts are in accordance with the English doctrine: *Howard v. Duncan*, 3 Lansing 174; *Greenfield Bank v. Crafts*, 4 Allen, Mass. 447; *Wellington v. Jackson*, 121 Mass. 157; *Casco Bank v. Keene*, 53 Maine 103; *Bartlett v. Tucker*, 104 Mass. 336. This was a partnership matter, and the act of the one partner bound his co-partners. They also referred to *Garland v. Jacomb*, L. R. 8 Ex. 216, 220; *Turner v. Wilson*, 23 C P. 87.

McCarthy, Q.C., and *A. Bruce*, Q.C., contra. There was no authority to use the partnership name. This was a private matter of H. Young. It is quite clear that there

is no authority to use the partnership name for private purposes : *Royal Canadian Bank v. Wilson*, 24 C. P. 362. It has been argued that the signature here was not a forgery, but that the bill was really drawn by the defendants. But the evidence is overwhelming to shew that it was a forgery. There was no ratification. To constitute ratification of an act, it must be done by an agent as an agent and for a principal. There, therefore, can be no ratification of a forgery, as the person committing the forgery does not purport to do the act as an agent, but merely personates another. If he does the act thinking he has authority, then there may be ratification ; but if he knows he has no authority, and knows he is committing a forgery, as was the case here, clearly there can be no ratification : *Anson on Contracts*, 331 ; *Brook v. Hook*, L. R. 6 Ex. 89, and cases there cited. The case of *McKenzie v. British Linen Co.*, 6 App. Cas. 82, turned on the construction of the Scotch law. The American authorities do not afford much assistance, as they are very conflicting. The law is properly laid down in *Daniel on Negotiable Instruments*, 3rd sec. 1351, where all the cases are collected. Many of the American cases put it on the ground of want of consideration, and this seems correct, for what consideration can there be ? They also put it on the ground that it is against public policy as compounding a felony. The next ground urged by the plaintiffs is, that there is an estoppel. This is based on a very different principle. The rule is laid down in *Freeman v. Cook*, 2 Ex. 654, 660, 663, that where a person by his conduct induces another to believe a certain state of facts, and to act on them as true, and the latter does act on them, the former is estopped from denying the facts were as represented. There must be something said or done to induce the other to act upon it, and he must act upon it to his detriment. If the defendants had said or done nothing, then there would be no liability. Then is it proved here that anything was said or done by the defendants by which the plaintiffs in any way changed their position, or were in any way injured ? There is

certainly no such evidence here: *Knights v. Wiffen*, L. R. 5 Q. B. 660; *Burkinshaw v. Nicolls*, 3 App. Cas. 1004, 1026; *Blackburn on Sales*, 2nd ed., 1190; *Simm v. Anglo American Telegraph Co.*, 5 Q. B. D. 188; *Rudd v. Mathew*, 42 Amer. 231. The plaintiffs cannot set up that they refrained from prosecuting for the forgery, as they have always contended that there never was a forgery, but merely that they did not bring a civil action; but in any event the authorities would shew that no civil action will lie until the party is first prosecuted, [ROSE, J., referred to *Taylor v. McCullough*, 9 O. R. 309, where the authorities on this point are collected]. They further referred to *Broom's Legal Maxims*, 6th ed., 822-6; *Chalmers on Bills*, 2nd ed., p. 72; *McHugh v. County of Schuylkill*, 5 Amer. 445; *Shisler v. Vandike*, 37 Amer. R. 702, *Murphy v. Borse*, L. R. 10 Ex. 126, 129; *Merchants Bank v. Bostwick*, 28 C. P. 450, 3 A. R. 24.

Robinson, Q. C., in reply. It would require a very acute imagination to distinguish between acting for another and personation. Is not the act of personation the assuming to act for another? *Story on Agency*, sec. 240. The strongest argument is, that in the case of *McKenzie v. British Linen Co.*, 6 App. Cas. 82, no counsel in the case attempted to set up that there could be no ratification; and as to the law of Scotland being different, it is admitted in the case to be the same. Then as to estoppel, the defendants by their conduct induced the plaintiffs not to take proceedings for the forgery. The bank under the circumstances dared not have arrested H. Young.

December 24, 1886. CAMERON, C. J.—This Court would seem to be concluded by the decision of the Queen's Bench Division in *Westloh v. Brown*, 43 U. C. R. 402, and *Brook v. Hook*, L. R. 6 Ex. 89, from holding that a person whose name has been forged to a promissory note or bill of exchange, can make himself liable thereon in the absence of circumstances amounting to an estoppel by ratification. In other words such a note cannot be

validated by ratification. It is not necessary now to express dissent from or concurrence in the soundness of those decisions.

The language of the Law Lords who gave judgment in *McKenzie v. British Linen Co.*, 6 App. Cas. 82, would certainly seem to leave the matter in doubt. At first sight it seems not only plausible but sound to say a forgery cannot be adopted or made valid, and with reference to the criminal responsibility of the person committing the forgery there is no doubt it is sound. But when it is considered that one may adopt as his own the unauthorized act or agency of another, and a note may be validly made so as to bind the person by whom it purports to be made if the person who signed was authorized to sign for the other, it is somewhat difficult to see why the unauthorized act may not be validated by acknowledging the authority of the writer,—in other words ratify his agency. In *Brook v. Hook*, the defendant positively denied that he had made the note and disputed all liability thereon, and he only acknowledged liability to prevent a criminal prosecution of the forger. This was in contravention of public policy.

But, assuming *Brook v. Hook* distinguishable, the case of *Westloh v. Brown* cannot be disregarded by this Court. The learned Judge who tried the cause has found the bill of exchange was a forgery, and there is evidence to support such finding. Whether, taking all the circumstances of this case appearing in evidence, I should have come to the same conclusion, it is not necessary for me to say as I cannot now say the finding was wrong and unsupported by the evidence.

It remains to be considered whether the defendants are estopped by their conduct from disputing, as far as these plaintiffs are concerned, their liability on this bill of exchange. One of my learned brothers thinks they are not, as I understand, because it does not appear by evidence that they have been prejudiced by anything that was done or said by the defendants or either of them. That is,

they have not been shewn to have taken any step or refrained from doing anything that they otherwise would not have taken or would have done. If it is necessary that there should be affirmative evidence of their being prejudiced by actual doing or refraining from doing, there has been no legal estoppel in this case. But I am of opinion the principle of estoppel is more extensive in its application, and it will be sufficient if it be shewn that in absence of the matter of estoppel, the plaintiffs might have put themselves in a position from which a benefit might accrue to them. It is unimportant whether they would have taken steps to secure the benefit or not.

I do not think it is possible to lay down any rule for the application of the principle of estoppel that will suit or cover all cases. In the multifarious and ever varying transactions of the present day there is no mind comprehensive enough to make provision that will extend to each and all, unless the simple one be adopted, that wherever by act or representation intentionally done or made to induce or prevent a person from doing or refraining to do any act, that person has been lulled into security and has his true position kept from him, and he does not do or does not refrain from doing such act in consequence of the alleged matter of estoppel, whether at the time of the act or representation he contemplated doing the act or refrained from doing it or not.

In the present case, assuming the defendants' name to have been forged, the plaintiffs would immediately on the discovery of the forgery have been in a position to have arrested Hamilton Young for the forgery and to have sued him for the money obtained on the forged draft, and might by suit then instituted have placed themselves in a better position with regard to Hamilton Young and his estate than they were afterwards. Then, having this right, they, at the request of Hamilton Young, who was the manager of the defendants, and authorized apparently by his position to make such request, in August, had the bill recalled from Montreal, where it had been sent by

the bank for acceptance by the drawee. And on the 27th of August the defendant Lucas went to the bank and asked to see the bill. He was then aware of the existence of the bill as on the 25th of August the defendants and Hamilton Young had an arrangement by which the defendants were authorized to charge to Hamilton Young's account the amount of this draft, and in the letter of authority to so charge the draft, the paper is declared to have been discounted for his, Hamilton Young's accommodation.

According to the evidence of Mr. Bellhouse, who was acting as manager of the bank at the time, the following conversation then took place between him and Lucas: "Mr. Lucas examined the bill very critically both back and front * * I asked him 'is there anything scaly in the bill that you are examining it so carefully?' He did not reply directly, but he looked at it again and ran his thumb along the signature and said, 'Ben is not usually so shaky.' I told him the bill was recalled at the request of Hamilton Young, and I think as he went out of the office he said he would call in a day or two and see if the bill was taken up." This witness then gave an account of his interview with the other defendant James M. Young, as follows: "He came again in a few days afterwards, two or three days after, I should judge. He asked to know the amount of McElderry's bill. He asked to see the bill. I shewed him the bill * * He looked closely at the bill and examined it very carefully, and I said to him 'Will you send me up a cheque for that?' He looked at his watch and said it was 'rather late to day to get up a cheque in time,' but he would 'send me one up on the following day.' I said 'that would do.' Then he said, 'By the way what is the amount of it with the costs, and took a memorandum of the amount."

The witness, afterwards, in company with Mr. Kittson, one of the solicitors of the bank, went to the defendant's place of business and there saw the defendant, James M. Young. He gave the following account of what took

place: "Mr. Kittson said to him exhibiting the note (bill) that we 'had come to see about this note,' and I said to him, 'Why didn't you send to us the cheque as you promised?' He answered, 'I don't know.' I said, 'Do you not recollect promising to send me the cheque?' and he said, 'yes.' I think I said, 'Well, why did you not send it as promised?' I am not positive of this, but I think he replied, that he thought at the time he would send it. Mr. Kittson asked him several questions about the signature. He asked him, shewing the note, 'Is that your signature?' He declined to answer. Mr. Kittson asked him several questions of the same sort: 'Will you say it is not your signature?' To all of which he declined to return an answer."

With reference to the first interview the defendant Young in his evidence said: "I think he asked me if we were going to pay it. I do not recollect very clearly what I said, but I think I said it probably would be paid. He put the time of the conversation about the 2nd or 3rd of September, and that he had not spoken to Hamilton Young prior to that about the matter, but said he got the letter of the 25th August, 1883, from Hamilton Young, who was supposed to have a large amount of capital in defendants' business, and he stated, when he told Bellhouse that he supposed the bill would be paid, he thought there would be sufficient capital of Hamilton Young's to pay this bill and the two others."

In his examination under the Administration of Justice Act, he said: "There was a telephone communication from Mr. Bellhouse asking when we were going to send a cheque for the draft. I answered the telephone. I said that I would come up and see him. I think I said I had been out of town. I said nothing else that I remember of. I did not go up and see him. I had no particular desire to see him. I did not keep my promise because we had no intention of paying that draft, and therefore it was not necessary for me to take any further notice of it. When I say "we had no intention" I mean by "we" Mr. Lucas and myself. When I replied by telephone I had with Mr. Lucas come

definitely to the conclusion that we would not pay the draft."

This was practising a deception that I should not have expected in a person of the position and standing of the defendant Young, and it was a deception that prevented the plaintiffs immediately enforcing a just claim that they had against Mr. Hamilton Young; and I trust the doctrine of estoppel will prove elastic enough to operate in favour of the plaintiffs to make the defendants liable in this case.

In *McKenzie v. British Linen Co.*, 6 App. Cas. 82, which it was strongly contended on the argument of this case must be taken to have overruled *Brook v. Hook*, Lord Blackburn thus expressed himself, at p. 100: "And I agree that though he did not ratify the act of Fraser, yet he may preclude himself, bar himself, by a personal exception from averring against the bank that the signature was not genuine. Lord Deas says 'that a duty lies upon a party whose name is forged not to do or say anything that may mislead a bank. It is his duty not to say anything that may so far deceive a bank as to enable a forger to escape from justice, and thereby, for anything that he can tell, prevent the bank recovering from him full indemnity. He is not entitled to speculate upon the consequences that may ensue if the bank is prevented from going immediately against the forger. He is bound to take for granted that the result will be to prevent them from recovering on the bill, which otherwise they would.' I agree that if he thus leads the bank to believe in the genuineness of the signature till it has lost some opportunity of recovering on the bill which if the bank had known of the forgery they might have used, it would be a sufficient alteration in the bank's position to preclude him as against the bank. But when Lord Deas says: 'In cases of this kind, where he has peculiar means of knowledge, whether his signature is forged or not he is not entitled by saying or doing some thing, or not saying or doing something, to lead his neighbour to think that his signature

is genuine to his neighbour's loss, he goes further than I am inclined to follow in the words '*by not saying or doing something.*' And when he says 'there was here not only a moral but a legal duty on the part of the suspender to have informed the bank that his signature to the first bill was a forgery, and if he had done so there would not have been a second bill,' I not only doubt his position that there was a legal duty then to have informed the bank, but I deny his conclusion of fact. * * It would be quite a different thing if it were proved that McKenzie knew that the bank had put the second bill with his name on it to Fraser's credit, and knew that at a time when he had reason to believe that he would be permitted to draw against it. His silence then would certainly prejudice the bank, and would afford very strong evidence indeed that McKenzie for Fraser's sake thus ratified Fraser's act for a time; and *ratification for a time* would, I think, in point of law *operate as a ratification altogether*. But if McKenzie (as his case is) first knew that the bank had taken the second bill on the faith of his forged signature on receiving the intimation of the 19th July, he knew that the bank were not going to give further credit to Fraser on the faith of that signature; and that all the mischief was already done. I cannot think that even if McKenzie had gone so far in his endeavours to shield Fraser from the consequences of his criminal act as to make himself liable to criminal proceedings for an endeavour to obstruct justice, that would bar him from averring against the bank that the signature was not his. Certainly I think that his not telling the bank on the 15th July nor till the 29th of July, that it was a forgery, and so letting them continue in the belief that it was genuine, if he had not induced it, could not so preclude him if, as I think was clearly the fact here, the bank neither gave fresh credit in the interval, nor lost any remedy, which, if the information had been given earlier, they might have made available."

It appears to me that this language of Lord Blackburn applied to the circumstances of this case makes the defen-

dant James M. Young, at least, liable. Young did not keep silent, but promised to pay the bill, and at the time of such promise he had the authority of the alleged forger to apply moneys of his in the defendants' hands to the payment of this very bill; and by this course tied the hands of the plaintiffs and prevented them from availing themselves of their then legal remedies, both civil and criminal, against Hamilton Young.

The language of Lord Watson, adopting that of Lord Wensleydale in *Freeman v. Cooke*, 2 Ex. 654, I think is equally pertinent and sustains the view I have endeavoured to set forth. It is, at p. 108: "The question whether a forged bill has or has not been adopted by the person whose signature is forged, is in reality an issue of fact and not of law. Still, adoption of a bill may be a matter of legal inference from certain ascertained facts; and in the present case the inference which has been drawn by the Court below, adversely to the appellant, appears to depend upon the fact, that after he came to know in July that the second bill had been discounted with the bank, he (the appellant) kept silence, or at least did not inform the bank of the forgery of his own name until a fortnight or thereby, had elapsed. The only reasonable rule which I can conceive to be applicable in such circumstances is, that which is expressed in carefully chosen language by Lord Wensleydale in *Freeman v. Cooke*. It would be a most unreasonable thing to permit a man who knew the bank were relying upon his forged signature to a bill, to lie by and not to divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once, if he did actually give the information, and if when he did so, the bank was in no worse position than it was when it was first within his power to give the information."

Lord Selborne, L. C., also by implication would seem to hold the opinion that what took place in this case would

render the defendants liable. At page 91 of the report of the same case he adopted the view that the appellant was not liable, because "he has done nothing from first to last by which the respondents can have been led to act in any way in which they would not otherwise have acted, or to omit to take any step for their own security, or in any sense for their benefit, which they would otherwise have taken; nothing from which the respondents or a Court of justice could reasonably infer that he 'adopted,' or admitted his liability upon this bill."

To hold it imperative on the plaintiffs in this case to have shewn affirmatively that they would have taken some and what step against Hamilton Young if they had been aware of the forgery when James M. Young promised to pay the bill, is to hold them bound to shew something that at the time they had no thought of as the matter was not in any way present to their minds; and I think it must be sufficient to shew that by the intentional concealment of the truth by the defendants and their promise to pay the bill the plaintiffs were hindered from taking proceedings which might have proved to their advantage against Hamilton Young. They might have sued for money had and received before the maturity of the note, and this earlier right of suit might have been greatly to their benefit. The defendants, who by their conduct deprived the plaintiffs of the opportunity of resorting to that remedy, are not to be permitted to require the plaintiffs to prove that resort to that remedy would have been productive of gain or advantage to them. If the plaintiffs are entitled to recover I do not think the fact that when the bill was discounted the proceeds, by the directions of Hamilton Young, were carried to his credit makes any difference in that right. Hamilton Young was the financial manager of the defendants and the plaintiffs would have been justified in handing the money to him on discounting the bill, and it can make no difference in the liability of the defendants that instead of handing the money to him over the counter they allowed him to draw it out by cheque.

I am of opinion, therefore, the judgment for the defendants should be set aside and judgment entered for the plaintiffs for the amount of the bill of exchange, with interest and costs. I do not think so deciding is contrary to the decision of the Court of Appeal in *Walker v. Hyman*, 1 A. R. 345. The language of some of the Judges in the cases there cited may indicate that some proof is necessary of the plaintiffs having done some act or omitted to do some act in consequence of the act or representation relied on as an estoppel; but the language of Judges must always be read in reference to the circumstances of each case and the spirit of the judgment, the principle involved and determined must guide.

GALT, J.—This case was tried before me at Hamilton.

At the close of the evidence I gave judgment in favor of the defendants. I stated expressly, as appears from the reporter's notes: "I give judgment in favour of the defendants, with costs. I find that the draft in question is a forgery; but in moving you may take any rule you please, and I will tell the Court that the case was not argued here."

I agree with the judgment of the Chief Justice that under the circumstances the defendants are estopped from disputing the claim of the plaintiffs. The circumstances are very much stronger than in any of the decided cases which I have seen. The facts are uncontradicted.

I regret to say I cannot change my opinion as to the forgery of the name of J. M. Young, although I am satisfied that at the time Hamilton Young signed the draft in the name of his brother he had no intention of defrauding the defendants. Hamilton Young had been for a short time a partner with the defendants Lucas & Young, carrying on business under the name of The Hamilton Cotton Company. The partnership lasted for only a short time, when he withdrew, leaving a very considerable sum of money in their hands, and he assumed the position of general manager, but he had no authority to sign drafts. In addition

to conducting the affairs of the company he embarked in speculations of his own in reference to purchases of cotton, in connection with which he drew several bills of exchange, and most improperly drew them in the name of The Hamilton Cotton Company. Among others he, on the 25th June, 1883, drew the bill of exchange now in question on a firm in Montreal. This was discounted by the plaintiffs and sent to Montreal, where it was duly accepted. While the bill was current Hamilton Young, about the 25th August, called at the office of the plaintiffs and requested them to recall the bill, and said: "we are settling up with McElderry." The bill was returned and received by the bank on the 27th August. These dates are important as regards the conduct of the defendants.

From the evidence it appeared that on the 25th August, Hamilton Young wrote the following letter to the defendants:

"Dear sirs—I hereby request and authorize you to retire and charge to my account with your company a note made by you, indorsed by M. Wright, discounted in the Ontario Bank, and due on or about the 7th September, for \$5,718.60; also a note made by you indorsed by said Wright, discounted in said bank and due on or about the 7th October next, for \$5,312.18; also a draft made in your name on F. McElderry of Montreal, discounted in the Merchants' bank here, and due on 28th September next. The said notes and drafts were discounted for my accommodation, and the proceeds applied to my own use, and your company should pay no portion thereof."

The last mentioned draft is that now in question. It must have been about the same time that H. Young requested the plaintiffs to recall the draft, for, as I have already stated, the bill was received by them on the 27th.

It is to be observed that this draft having nothing to do with the companys' business, does not appear in their books; consequently when the defendant Lucas called at the bank on 27th August, he must have received notice of its existence from H. Young.

Mr. Bellhouse, who was acting manager of the plaintiffs in his evidence, in answer to the question: "Who next called to see you about the bill, stated. Mr. Lucas came in on the 27th, the day the bill got back. He asked to see this bill. He said, 'you hold a bill. on McElderry for \$2,760,' and asked to see it. Mr. Lucas examined the bill very critically both back and front. Seeing him examine it so carefully I asked him is there anything scaly (or words to that effect) in the bill that you are examining so carefully? He did not reply directly, but he looked at it again and ran his thumb along the signature and said, 'Ben is not usually so shaky,'" (Mr. James M. Young, the defendant, is usually called Ben.) "I told him the bill was recalled at the request of Hamilton Young, and I think as he went out of the office he said he would call in a day or two to see if the bill was taken up. I do not recollect his saying anything else."

This is the whole of the evidence as regards the defendant Lucas respecting the bank.

Let us see then the position in which he stood in relation to his knowledge of the dealings of Hamilton Young with the name of the Hamilton Cotton Company at that time.

From his own evidence it appears that owing to the absence of Mr. Bruce, who is the general legal adviser of the company, Lucas being uneasy on the subject of the transaction of Hamilton Young, had sent for Mr. Gibbons of London, who made thorough investigation, and (as I understand the evidence) by whose instructions Hamilton Young wrote the letter of 25th August, to which I have already referred. When we refer to that letter we find there is a marked distinction between the reference to the first two drafts and the bill now in question. He speaks of the former as "made by you," and of the latter as "a draft made in your name."

I therefore entertain no doubt that at the time when he "critically examined" the bill he knew that Hamilton Young had signed the name of J. M. Young without authority and that it was a forgery. It was a mere pretence when he said "Ben is not usually so shaky."

Now as respects his statement, that he would call in a day or two to see if the bill was taken up, we know that at that time there was a very considerable sum of money standing to the credit of Hamilton Young in the books of the company, and that the company were specially authorized by the letter of 25th August to apply a portion of it in retiring this draft, he was therefore well aware that it rested with himself, and James M. Young, whether the bill was taken up.

In the extracts from his examination, read at the trial, he is asked : "Had Hamilton Young a considerable sum at his credit in the books of the Hamilton Cotton Company in August, 1883? A. He was supposed to have ; he certainly had some money there. Q. Do you believe he had as much as \$10,000 at his credit in August, 1883? A. I think he might have." Just before these questions were asked he had in answer to the question, "If a legitimate cheque of the Cotton Company for \$1,800 had been presented to the Bank of Hamilton, though their account was overdrawn, would that have been a suspicious transaction?" said, "No, I don't think it would ; I don't know what Mr. Hamilton Young has at his credit in the Hamilton Cotton Company ; he may have two or three thousand dollars ; I don't know what it is." This statement was made after this suit was commenced ; and, on referring to the examination of James M. Young on the trial, in answer to the question : "You were asked whether you did not say in your examination that Hamilton Young had a small balance in his favour at that time. Had he in fact?" said, "I believe he had. Q. What has become of it? A. I believe it was paid to Mr. Osler. Q. What time did you pay the money to Mr. Osler? A. I cannot tell, it was since my examination. Q. Can you tell near the amount? A. I cannot, I think it was somewhere in the neighbourhood of \$1200."

It is manifest from the foregoing that at the time the bill was returned to the bank, and shewn to the defendant Lucas, Hamilton Young had a large sum at his credit ; and, even after the commencement of this suit, there was a con-

siderable balance in the hands of the defendants, which, as I have already shewn, they had the authority to apply in payment of this bill.

I turn now to the evidence affecting the defendant James M. Young: Mr. Bellhouse, after being examined respecting Mr. Lucas, which has been already set out, is asked, "Whom next did you see on the subject of the bill? A. Mr. James M. Young. He came in a few days afterwards, two or three days after, I should judge. He asked to know the amount of McElderry's bill. He was standing in the manager's office. I was present. He looked closely at the bill, and examined it very carefully, and I said to him, 'Will you send me up a cheque for that'? and he looked at his watch and said it was rather late to-day to get up a cheque in time, but he would send me one up on the following day. I said that would do." Q. "Did the cheque come?" A. "It did not."

It is unnecessary to refer to any other parts of the evidence as respects the absolute promise made by James M. Young to pay the bill, as his having done so could not be disputed, and this promise was made after he had received the letter of 25th August from his brother, and after, as he stated at the trial, he had satisfied himself it was a forgery.

In considering the evidence to which I am about to refer it must be borne in mind that the bill in question would not be due until the 28th September. Mr. Bellhouse is asked: "Do you recollect going to see Mr. James M. Young?" A. "Yes; I went down to the Cotton Company with Mr. Kittson. The date is 13th September, 1883." "Who went with you?" "Mr. Kittson, one of the solicitors of the bank. He had the draft in his hand. I saw it in his hand. We went to the Hamilton Cotton Company's office. Mr. James M. Young was not in when we went there, but they sent out for him, and he came in; and Mr. Kittson said to him, exhibiting the note, that we had come to see him about this note, and I said to him; 'Why didn't you send the cheque as you promised?' He answered, 'I

don't know.' I said, 'Do you not recollect promising to send me the cheque?' and he said, 'Yes.' I think I said, 'Well, why did you not send it as promised?' I am not positive of this, but I think he replied, that he thought at that time that he would send it. Mr. Kittson asked him several questions about the signatures. He asked him, shewing him the note, 'Is that your signature?' He declined to answer; and Mr. Kittson asked him several questions of the same sort. 'Will you say it is not your signature?' to all of which he declined to return an answer."

It appears to me impossible for the defendant Young to have acted in a more disingenuous manner. He knew that the plaintiffs, relying on the genuineness of the bill, had cashed it, as they believed, for the accommodation of the Cotton Company. He had also promised to pay it; and, moreover, had money in his hands belonging to Hamilton Young which the latter had authorized him to apply to that purpose. He knew that the draft was not due, and consequently, owing to his own conduct, he precluded the plaintiffs from proceeding criminally against Hamilton Young, for it would have been a very extraordinary measure to arrest him for forgery when the person by whom the bill purported to be signed had promised to pay it, and on being asked expressly whether the signature was his declined to answer.

In my opinion the defendants are estopped, as respects the plaintiffs from denying their liability.

It may be said that this misconduct has reference to Young alone, and not to Lucas, but this is not so, for it is manifest from the evidence that they had both decided on the course of conduct to be pursued by them.

The only case to which I think it necessary to refer is *McKenzie v. British Linen Co.*, 6 App. Cas. 82. The circumstances of that case, as respects the appellants, are so different from the present that it is unnecessary to set them out; but I refer to the opinion expressed by the Lord Chancellor, and Lord Justice Blackburn, bearing on the question now before this Court, viz, estop-

pel by conduct in cases where forgery has been committed.

The Lord Chancellor says, at p. 90 : " In this case there are two questions," (precisely the same as those now before us); "the first, whether the appellant authorized or assented to the signature of his name as drawer and endorser of the bill of exchange of 14th of April, 1879 ; the second, whether, if he did not, he has nevertheless so acted as to be estopped from denying his liability on that bill in a question between himself and the respondents, The British Linen Company. If the first of these questions ought to be answered in the appellants' favour, I am clearly of opinion that the circumstances of the case raise no estoppel against him. He has done nothing from first to last by which the respondents can have been led to act in any way in which they would not otherwise have acted or to omit to take any step for their own security, or in any sense for their benefit, which they would otherwise have taken ; nothing from which the respondents or a Court of Justice could reasonably infer that he 'adopted,' or admitted his liability upon this bill."

This opinion appears to me a direct authority in favour of the plaintiffs. The defendants not only promised to pay the bill, but Young acted in such a manner, when questioned as to his signature, as to preclude the plaintiffs from taking criminal proceedings against Hamilton Young.

Lord Blackburn, referring to the judgment of Lord Deas, one of the Lords of Session, whose judgment was in appeal : " And I agree that although he did not ratify the act of Fraser, yet he may preclude himself, bar himself, by a personal exception from averring against the bank that the signature was not genuine." Lord Deas says ' that a duty lies upon a party whose name is forged not to do or say anything that may mislead a bank. It is his duty not to say anything that may so far deceive a bank as to enable a forger to escape from justice, and thereby, for anything that he can tell, prevent the bank from receiving from him full indemnity. He is not

entitled to speculate upon the consequences that may ensue if the bank is prevented from going immediately against the forger. He is bound to take for granted that the result will be to prevent them from recovering on the bill which otherwise they would.' I agree that if he thus leads the bank to believe in the genuineness of the signature till it has lost some opportunity of recovering on the bill which if the bank had known of the forgery they might have used, it would be a sufficient alteration in the bank's position to preclude him as against the bank."

Upon these opinions I entirely concur in the judgment of the Chief Justice. I entertain no doubt that if the bank had on 27th August, the day when the bill was shewn to Lucas, caused the arrest of Hamilton Young the debt would have been paid. I do not mean that the felony would have been compounded ; but it is well known that in cases of forgery the fact of full satisfaction having been made has much weight in the awarding of punishment, and as the defendants had at that time ample means belonging to Hamilton Young he would have insisted on their so doing.

The rule must be absolute to enter judgment for the plaintiffs, with costs.

ROSE, J.—The plaintiffs claim from the defendants, trading in Hamilton under the name of The "Hamilton Cotton Company," payment of a bill of exchange, dated 25th June, 1883, for \$2760.

The defence is, that such document was a forgery. The alleged forger was Hamilton Young, manager of the company and brother of the defendant J. M. Young.

The learned Judge at the trial—my learned brother Galt—found that the bill was a forgery, and entered judgment for the defendants. Against this the plaintiffs move.

The plaintiffs rely upon the evidence establishing 1st. Adoption or ratification ; 2nd. Estoppel ; and contend that the finding of forgery should be reversed.

I may say I cannot see any sufficient ground for interfering with the finding of fact as to the forgery. If on the evidence the learned Judge had found in favour of the genuineness of the signature, I should have felt unable and unwilling to interfere. There was, I think, a distinct promise to pay and no assertion of forgery prior to Hamilton Young's absconding.

There is, however, evidence which supports the finding; and the fact must, I think, appear difficult to discover on the evidence adduced.

I cannot say the finding is wrong. I do not know whether it is or not. I would have felt a difficulty in determining. A similar difficulty at this stage prevents my interfering with the finding.

I have been unable to yield to the contention that there has been any adoption or ratification. I am unable to apprehend how there could be of a forged signature.

A man writes a signature to a note, not being his own name, but purporting to be mine. He does not assume to do so as my agent, but puts off the paper as if the signature were really mine. In other words, he wilfully and wickedly commits forgery. The note or document has no validity. It is absolutely void. So far as I am concerned I am no more affected by the act than if it had not been done.

The holder of the paper comes to me for payment. I tell him the signature is forged, as the fact is; but I say I will pay the amount. What legal effect has such promise? Is it not a mere *nudum pactum*?

Or I refuse to pay, and a stranger standing by says he will pay. It is clear he would not be bound. How am I in a worse position than he?

Brook v. Hook, L. R. 6 Ex. 89-97, was relied upon as an express authority that there could be no ratification of a void note.

That case has been followed by *Westloh v. Brown*, 43 U. C. R. 402; and, unless that case has been overruled, we should, I think, follow it.

I do not remember counsel referring to *Westloh v. Brown*; but, plaintiffs' counsel relied upon *McKenzie v. British Linen Co.*, 6 App. Cas. 82, at p. 99-100, as shewing that *Brook v. Hook* was not now the law.

That case was not referred to in the House of Lords, and so was not expressly overruled.

Lord Blackburn certainly uses language which bears out Mr. Robinson's contention. He says, at p. 99: "I wish to guard against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defence for the forger against a criminal charge. I do not think he could. But if the person whose name was used without authority chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible just as if he had originally authorized it. It is quite immaterial whether this ratification was made to the person who seeks to avail himself of it or to another."

What he means by ratification may perhaps be indicated by the preceding sentences. "But even though it was not made out that the signatures were authorized originally, it still would be enough to make McKenzie liable, if knowing that his name had been signed without his authority, he ratified the unauthorized act. Then the maxim '*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*,' would apply."

I find this maxim translated in *Wharton's Law Lexicon*, p. 539, as follows: "Every consent given to what has been already done has a retrospective effect, and is equivalent to a previous request." Counsel before us agreed that ratification did not require either consideration or change of circumstances.

The *McKenzie Case* did not turn upon this point, and no judgment was given upon it. We have only the expression of opinion.

Of course one hesitates in differing from so eminent a Judge as Lord Blackburn; but I am unable at present to apprehend how there can be ratification of a void act—how there can be a consent given to such an act which would be equivalent to a previous request. Such language would be applicable to an act done professedly as an agent though without authority; but not, as it seems to me, to an act such as forgery. I am glad to be able to rest upon the express decision of our own Court upon the point.

Lord Selborne, L. C., in the same case, did not consider the question of ratification. He, at p. 90, stated the questions to be two: 1. Authority or assent. 2. Estoppel; and disposed of the case on these facts.

Lord Watson, as I apprehend him on p. 108, uses the word "adoption" as synonymous with "estoppel." The case decides that mere silence does not make a person liable on a forged bill by estoppel.

I have had more difficulty with the question whether the defendants have not estopped themselves or, at least, whether J. M. Young has not estopped himself from denying that the signature is genuine.

The definition of estoppel may be found in *Walker v. Hyman*, 1 A. R. 345, as extracted from various decisions such as *Pickard v. Sears*, 6 A. & E. 469, and *Freeman v. Cooke*, 2 Ex. 654.

Not only must one who owes a duty to another make such representations as the other is justified in acting upon, but the person to whom such representations are made must act upon them to his prejudice to constitute an estoppel. By acting I mean doing or omitting to do. I have no doubt the conduct of the defendant J. M. Young was calculated to lead the plaintiffs to believe that the signature was genuine. He promised to pay the defendants, or that it would be paid. This I would find as a fact. No assertion that the signature was a forgery was made until Hamilton Young had left the country.

I see no evidence of the plaintiffs doing anything in consequence of such conduct. Did they omit to do anything?

Lucas, according to the plaintiffs' evidence, threw doubt upon the signature when he went to the bank. This was prior to the paper falling due. The bank knew or believed that other forged paper was afloat, and that the Bank of Commerce claimed that they had paid a cheque forged by him. They placed two detectives on his track to see, as the manager says, if he would leave the country.

For this he gives a reason not very satisfactory. He is asked, "What was the good of watching him?" A. "To be on the safe side." Q. "How would that keep you on the safe side? What better would you be if he cleared out?" A. "If he cleared out we would know it was a forgery."

This had reference to the cheque known as the Ryan cheque, to which I have referred.

If the detectives were not employed to arrest him in the event of his attempting to abscond; and, from the above, it would appear they were not, then the real reason for their employment is not given.

Speaking of the Ryan cheque, p. 31 of the notes of evidence, the manager said they did not arrest him because they did not believe it to be a forgery.

I find no evidence that the plaintiffs were led, by the action of the defendants or either of them, into the belief that the note was genuine, and that in consequence they did not arrest Hamilton Young.

The defendants' solicitors disputed their liability by letter, dated the 12th of September. I confess, however, that it seems to me in fairness that letter should have stated that the draft was a forgery.

On the 10th October this action was commenced. On the 15th November the statement of defence was put in denying the drawing and endorsing.

As I understand the evidence, Hamilton Young did not leave the city until some time in November.

It may be that if the defendants had not done as they did the defendants would have had Hamilton Young arrested, if abstaining would create an estoppel, or it may be they would have sued him by civil process, but they

have not said so. On the contrary, they come to Court relying on the genuineness of the signature after denial by the defendants, and do not say that if the denial had been made earlier while Hamilton Young was in the country they would have believed it, and acted differently.

Am I at liberty to assume what they do not assert?

The onus is on the plaintiffs to shew that they acted upon the representations or were misled to their hurt. Have they done so?

With some regret, owing to what seems not quite ingenuous conduct on the part of the defendants, I am unable to say the plaintiffs have satisfied the onus, and so think the motion fails, and must be dismissed, with costs-

Motion allowed.

[COMMON PLEAS DIVISION.]

STEINHOFF V. McRAE.

Receipt—Bills of Sale Act—Parol evidence—Admissibility of—Sale of growing timber—Removal within time named.

A receipt *qua* receipt is not a contract, but a mere acknowledgment, and is open to explanation and contradiction by parol.

S. sold all the elm and soft maple trees on a certain lot to T.; and at the time of sale gave T. the following receipt: "Received from J. L. for T., the sum of \$500, on account of elm and soft maple on," &c., the said lot, describing it. Parol evidence was admitted to shew, and the jury found, that "one of the conditions of the sale was that the timber was to be removed by T. within two years."

Held, that the receipt here was not the contract between the parties, but a mere acknowledgment of so much money; and therefore the parol evidence was properly admitted.

Held, also that the effect of the condition was, that T. was only to have the right to cut and remove the timber within the two years from the date of the agreement.

Johnston v. Shortreed, 12 O. R. 633, followed.

Seemle, that a sale of growing timber does not come within the operation of the Bills of sale and chattel mortgage Act.

THIS was an action for the conversion of certain elm and soft maple logs by the defendant, and claimed by the plaintiff as his property.

The cause was tried before O'Connor, J., and a jury, at Sarnia, at the Fall Assizes of 1886.

The plaintiff claimed the logs as the assignee of one Edward Tully, who claimed them by virtue of a sale made to him by one James Stubbs, on the 27th day of November, 1883, "of all the elm and soft maple trees on the south half of lot 21, in the 12th concession of the township of Sombra."

The defendant claimed them under a sale made to him by the said James Stubbs, under an agreement in writing dated 18th January, 1886, whereby the said Stubbs agreed to sell and haul to a place indicated, elm logs at three dollars and eighty-five cents per thousand.

The said Stubbs cut and hauled out the logs in question under this agreement, for the defendant.

The defendant in his statement of defence, among other things, alleged, that the said Tully, having taken off the

land a portion of the elm and soft maple trees, and having become indebted to Stubbs in a large sum, agreed with Stubbs, in consideration of being released from a part of his indebtedness to Stubbs, to relinquish all claim which he had upon the standing elm upon the said land, and gave over to the said Stubbs all his interest in the same; and that at the time the said Stubbs purchased back from Tully the said standing timber, he had no notice that Tully had transferred, or assumed to transfer the said timber to the plaintiff; and the defendant had no notice of the said claim when he bought from Stubbs and paid him for 94,000 feet.

The defendant further said that the said agreement for the said sale or license by Stubbs to Tully, was upon condition, that Tully, or any one claiming under him, should only be allowed to cut the timber for two years from the time of making said agreement and sale.

At the time Stubbs sold to Tully he gave the latter a receipt, as follows:

"\$500.00.

NOVEMBER 27th, 1883.

Received from John Langwith, for E. Tully, the sum of five hundred dollars on account of elm and soft maple, on the south half of lot 21, in the 12th concession of Sombra.

JAMES STUBBS."

Witness, JOHN LANGWITH.

The learned Judge left certain questions to the jury which, with their answers, were as follows:

1. Was there a surrender by Tully to Stubbs, whether in writing or not? A. No.

2. Was it one of the conditions of sale to Tully that the timber was to be removed by Tully within two years? A. Yes.

3. Was the assignment to Steinhoff *bond fide*? A. Yes.

4. Did the defendant purchase and obtain possession of the timber without notice of the plaintiff's claim to the timber? A. No.

5. What amount of damage did the plaintiff sustain by the taking and retaining of the timber? A. \$186.90.

Upon these findings the learned Judge directed judgment to be entered for the plaintiff for the said sum of \$186.90, with costs.

In Hilary Sittings, February 25, 1887, *Douglas*, Q. C., moved on notice to set the judgment aside, and to enter judgment for the defendant, on the ground that the jury, having found that the license to Tully to take the timber was for two years only, and that time having expired, the plaintiff had no right to the timber, and Stubbs had a right to sell it to the defendant.

In the same Sittings, *Douglas* supported the motion, and referred to *McGregor v. McNeil*, 32 C. P. 538; *Johnston v. Shortreed*, 12 O. R. 633.

Aylesworth, contra, referred to *McNeeley v. Williams*, 13 A. R. 324; *McMullen v. Williams*, 5 A. R. 518; *Summers v. Cook*, 28 Gr. 179; *Marshall v. Green*, 1 C. P. D. 35; *Smith v. Surman*, 9 B. & C. 561.

March 12, 1887. CAMERON, C.J.—If the contract or agreement between Stubbs and Tully was as stated in the defendant's statement of defence, upon condition that he, Tully, or those claiming under him, should be allowed to cut and remove the timber only for the period of two years, the plaintiff ought to fail, because his right had ceased to exist at the time the logs in question were cut by Stubbs and sold to the defendant. The finding of the jury, that it was a condition of the sale that the timber was to be removed by Tully within two years, must be taken, in connection with the pleadings, to mean that he, Tully, was only to have the right to cut and remove the timber during the two years following the date of the agreement. The finding of the jury being so interpreted, the case is not distinguishable from that of *Johnston v. Shortreed*, 12 O. R. 633, cited and relied upon by Mr. Douglas on the argument.

If, on the other hand, there was an absolute sale of the elm and soft maple trees, with an undertaking or promise on the part of Tully to remove the timber within two years, the omission to cut and remove the trees would not revest the property in the trees in Stubbs; and the plaintiff would succeed.

The evidence is not before the Court. The motion to set aside the judgment is rested entirely on the finding of the jury, the pleadings and exhibits filed. Unless the contention of the plaintiff is right, that the receipt put in is conclusive upon the parties and parol evidence was inadmissible to vary its terms, the entry of judgment for the plaintiff was wrong.

The receipt makes no limit of time; and, if it can be treated as containing the agreement between the parties, under the authority of *Marshall v. Green*, 1 C. P. D. 35, the timber must be treated as a chattel or personal property; and there has been a payment of the purchase money and a removal of a part of the timber, and so there has been a complete vesting of the property and right of property in the plaintiff. The receipt does not contain the terms of an agreement, or profess to be an agreement between the parties. It does not define what elm and soft maple means, whether trees, or cut logs, or wood, but is wide enough to embrace everything that the term elm and soft maple would embrace, whether trees or logs cut; and it would be competent to supply by parol evidence what was the subject the parties were bargaining or dealing about without violating the rule that prevents the altering or varying a written agreement by parol.

There is always a verbal arrangement of the terms of an agreement between the parties before the result of that arrangement is reduced to writing, except where the agreement is made only by correspondence; and when the arrangement or agreement has been reduced to writing so as to embody the previous verbal agreement, it cannot, in any manner, be altered or contradicted by parol.

The latest case in which the question has been very thoroughly considered is that of *McNeeley v. Williams*, in appeal, 13 A. R. 324, which, assuming that the receipt in question here was intended as the embodiment of the agreement of the parties, would be directly in point against the addition of the term or condition that the trees should be cut and

removed within two years. But I am of opinion the receipt is not the agreement between the parties, but a mere acknowledgment of the payment by Langwith of so much money for Tully. The term in the receipt *on account* of the elm and soft maple would, unexplained, imply that more was payable, or to be paid, by him to Stubbs, which it is conceded was not the fact. A receipt *qua* receipt is not a contract; it is a mere acknowledgment, and is open to explanation and contradiction by parol.

In the present case it comes within the rule stated by *Mr. Addison* in his work on contracts, 8th ed., p. 201: "Oral testimony in aid of insufficient written evidence of contract is admissible, when the contract is not required by law to be in writing. If a written document, for example, amounts to a mere admission or acknowledgment of certain facts, forming a link only in the chain of evidence by which a contract is sought to be established, it may be given in evidence concurrently with, and may be aided and supported, by oral testimony."

It has not been argued that the sale of the timber in the present case required to be filed in the office of the Clerk in the County Court of the County of Lambton, probably on the ground that the trees at the time of sale being standing or growing, and so not being capable of immediate delivery and an actual and continued change of possession, were not chattels within the operation of the Act respecting chattel mortgages and bills of sale, as the Queen's Bench held, when I was a member of that Court, in *Hamilton v. Harrison*, 46 U. C. R. 127, on the authority of *Brantom v. Griffiths*, 1 C. P. D. 349, that growing crops, for that reason were not within the operation of the Act. The reason applies to growing trees more strongly, probably, than to growing crops of grain, which are seizable in execution as chattels, while timber growing is not as against the owner of the land.

On the whole I am of opinion the defendant's motion must be made absolute to set aside the plaintiff's judgment

and enter judgment for the defendant, with costs, on the grounds stated in the motion.

GALT and ROSE, JJ., concurred.

Motion allowed.

[COMMON PLEAS DIVISION.]

SCOTT V. SCOTT.

Will—Acknowledgment of signature by testator—Validity of execution.

A testator brought his will which had been previously signed by him to two persons to sign as witnesses. The witnesses signed in the testator's presence, at his request, and in the presence of each other; and they either saw or had the opportunity of seeing the testator's signature. *Held*, that the will was validly executed.

THIS was a motion for an injunction to restrain "the defendant William Scott from in any case interfering with the estate of the late Isaac Scott, or from dealing with or disposing of any of the assets of the estate."

The notice was for an interim injunction; but upon the return it was agreed the learned Judge should pass upon the facts and give final judgment, without sending the parties down to trial.

On March 4th, 1887, *Graham*, supported the motion.

Elgin Meyers (of Orangeville), *contra*.

March 8, 1887. ROSE J. — The only question is, whether the will herein was properly attested.

The signature of the testator appears on the same page as those of the witnesses, somewhat in the following form :

Signed, sealed, and published by the said Isaac Scott, Senior, to be his last will and testament, in the presence of us.

ROBERT W. MORTIMER.

ALFRED JOHNSON.

} ISAAC SCOTT, Senior, (L.S.)

What took place appears to have been as follows, according to evidence taken before the special examiner, and by affidavit :

The testator, having had his will drawn, was desirous of having it witnessed. He spoke to Mr. Mortimer, and asked him if he was "willing to sign a will for him," and if he thought Mr. Johnson was willing also to sign. Mortimer said, yes he thought he was. He, Mortimer, was to ask Johnson; and accordingly saw him, and asked him if he would sign a will for Scott; and he said, yes. This was the same day that they did sign their names. Johnson boarded with Mortimer, and the testator lived near by.

The testator went over to Mortimer; took off his cap; the will was in his cap, as the witness Mortimer thinks, laid the will on the table; and Mortimer, as he says, "signed the will." He then got up from the table, and Johnson sat down and signed his name. The testator at the time was relating some story, or, as the witness says, "he was telling us about a certain yarn he had heard before. * * This was going on at the time we signed the will."

The witness gives the following answer to a question as to what occurred : "I will tell you the circumstances, and then perhaps you will understand it better than at present. Mr. Johnson got up from signing the will, and he turned to me and said : 'you know what we have signed,' and I said 'No, I don't know what I have signed, but I expect it is a will.' Those are the words as near as I can remember which were said. And the old man overheard what Johnson said to me, and he turned : 'yes,' he said, 'it is a will, you know.'"

Witness could not remember whether he said it is "a," or "the," or "my" will.

Johnson said : "He asked me beforehand about signing the will. Of course I supposed it was the will at the time, but I didn't know whether it was or not, consequently I asked Mortimer. By "he," I understand the witness meant Mortimer.

Again: "When I signed, Mortimer said, 'it is the will, you know.' When I signed Mortimer, said, 'sign your name.' I asked Mortimer if he knew what it was, and he said, 'no.' I said, I expect it is the will,' and the old gentleman heard what I said, and said, 'yes it is the will, you know.' You could not put any distinction whether he said 'a' or 'the.'"

Neither witness remembers seeing the testator sign his name.

One David Scott made an affidavit stating that he saw the testator sign the will on his, the testator's premises in Caledon, and that he told him he was going to get Mortimer and Johnson to become witnesses to it, the night he signed, but they were not at home that night; and that it was not for some little time thereafter that he got them to witness it.

I find as a fact that when the testator brought the will to Mortimer's house, it had been signed by him. (2) That the witnesses knew it was his will, and signed it as witnesses in his presence, at his request, and in the presence of each other. (3) That they either saw or had the opportunity of seeing the signature. I have no doubt they saw it, but that they have not that fact impressed upon their memories.

Do these facts shew the will to have been duly executed?

In *Jarman on Wills*, 4th ed., p. 108, it is said: "When the witnesses either saw or might have seen the signature, an express acknowledgment of the signature itself is not necessary, a mere statement that the paper is his will, or a direction to them to put their names under his, or even a request by the testator or by some person in his presence to sign the paper is sufficient."

Among the cases referred to in support of the testator is *Re Huckvale*, L. R. 1 P. & D. 375, where Sir J. P. Wilde cites from *Williams on Executors*, 6th ed., p. 84, as follows: "The result of the cases appears to be that where the testator produces the will, with his signature visibly apparent on the face of it, to the witnesses, and requests them to sub-

scribe it, this is a sufficient acknowledgment of his signature."

Gwillim v. Gwillim, 3 Sw. & Tr. 200, is referred to where it is said, at p. 204: "If it were necessary to have direct evidence that the name of the testator was on the will when he acknowledged it by asking them to witness his will, the proof of the execution would fail; but that certainly is not necessary, for the contrary was decided in *Cooper v. Bockett*, 4 Moo. P. C. 419."

Mr. Graham relied upon *Ilott v. Genge*, 4 Moo. P. C. 265, and *Blake v. Blake*, 7 P. D. 102.

In the former the witnesses did not see the signature written, the paper was folded to conceal what was upon it, and the witnesses were not told what the document was. He said: "I want you and Henry to sign this paper for me."

The Lord Chancellor said that the mere circumstance of calling in witnesses to sign without giving them any explanation of the instrument they were signing, does not amount to an acknowledgment by a testator.

In the latter case *Gwillim v. Gwillim*, and *Beckett v. Howe*, L. R. 2 P. & D. 1, are reviewed, and *Hudson v. Parker*, 1 Rob. 14 followed. The head note is: "To constitute a sufficient acknowledgment within sec. 9 of the Wills Act, the witnesses must at the time of the acknowledgment see, or have the opportunity of seeing, the signature of the testator, and if such be not the case it is immaterial whether the signature be, in fact, there at the time of attestation, or whether the testator say that the paper to be attested is his will, or that his signature is inside the paper."

The facts in this case take it out of these authorities.

The motion must be dismissed, and, pursuant to the affidavit of counsel to treat the hearing of the motion as the hearing of the cause, there must be judgment for the defendants, dismissing the action, with costs.

I have in the above view not found it necessary to consider the constitution of the action as to parties. It was stated that John, a son of the testator, was a lunatic.

Abraham was absent from the country, and had not been heard of for a long time. I have not examined the papers to determine what interest, if any, they have in the estate.

Since writing the above, Mr. Graham has sent to me a memorandum of further authorities as to the necessity of acknowledgment by the testator being prior to the signing by the witnesses of their names. I have not referred to the American cases cited, as on the above facts and authorities, I think there was a sufficient acknowledgment prior to the witnesses signing, that is, the testator having signed and requested them to meet him for the purpose of witnessing the will, and his signature being before them amounted to acknowledgment.

I have, however, examined the case of *Hindmarsh v. Charlton*, 8 H. L. Cas. 160. It is a decision that the acknowledgment by a witness of his prior signature is not a signing by him in the presence of the other witnesses, and that the Act 1 Vic. ch. 26, sec. 8 (Imp.), required an actual signing.

Judgment accordingly.

[CHANCERY DIVISION.]

NORMAN ET AL. V. HOPE.

Replevin—Action against sheriff for taking insufficient bond—Damages recoverable therein—R. S. O. ch. 53, sec. 11.

Held, that it is the sheriff's duty in replevin to take a bond with two sureties, and to use due care and to exercise a reasonable discretion in inquiring into the sufficiency of the sureties, and that when he had failed to do this, and the owner of the goods replevied, and the bailiff (defendants to the replevin suit, which had resulted in their favour) brought an action against him for damages consequent thereon, they were entitled to recover all such damages as naturally flowed to them from his wrongful act, viz., the rent in arrear, the costs of distress, and of the replevin suit, and of an action against the principal and sureties on the replevin bond and incidental thereto, provided the same did not exceed the penalty named in the bond: and the defendant could not excuse himself by shewing that the plaintiff in replevin and one of the sureties was worth the amount of the penalty of the bond at the time it was taken.

THIS was an action brought by Ralph M. Norman, merchant, and Henry Bull, bailiff, against William Hope, sheriff of the county of Hastings, to recover damages sustained by reason of the defendant having taken a replevin bond with insufficient sureties.

The statement of claim set out that on August 15th, 1884, Henry Bowen issued a writ of replevin out of the County Court of the county of Hastings to replevy two oxen out of the plaintiffs' possession, which writ was directed to the defendant, and placed in his hands for execution, and it thereupon became his duty before he acted therein to take a bond in treble the value of the said oxen, which was stated in the writ of replevin to be \$80: that it was his duty to use due and proper diligence and care in taking good and sufficient sureties able to answer the conditions of such bond: that in violation of this duty he negligently, improperly, and illegally took a bond with sureties that were insufficient: that in thus acting he did not comply with the requirements of R. S. O. ch. 53, sec. 11; that nevertheless the defendant replevied the goods, and the plaintiffs were forced to defend the replevin suit consequent thereon, which was tried in the County Court in December,

1884, when judgment was entered for the plaintiffs, with costs, and writs of execution to levy the amount thereof were placed in the defendant's hands, and also a writ of redelivery of the oxen, but he returned the writ for costs "no goods," and to the writ of redelivery he made return that the oxen were not to be found, and the costs had not been paid or the oxen returned: that on the said return to the writs the plaintiffs demanded and obtained an assignment of the replevin bond, and brought an action upon it against the obligors, and recovered judgment, and issued execution for the damages, and taxed costs amounting to \$300 against the goods and lands of the obligors, and placed them in the defendant's hands, but they were returned "no goods," and "no lands," respectively: and the plaintiffs claimed from the defendant \$500 damages and loss occasioned to them by the defendant's illegal and improper conduct in the premises, and further relief.

By his statement of defence the defendant alleged that the bond taken was in due and proper form: that the obligors were at the time such bond was executed perfectly sufficient and responsible for the amount of the penalty therein stated: that after the bond had been returned to the plaintiffs it became their duty to have given the defendant notice of any objection to the bond, and of its insufficiency or irregularity, but they neglected to do so, and should not now be allowed to take advantage of default caused by their own neglect: that the statement of claim was defective in that it did not allege that the plaintiff in the said replevin suit, Henry Bowen, who executed the said bond was not at the time of the execution thereof, and was not now responsible for the amount of the penalty therein stated, and the defendant claimed the same right in respect to this defect as if he had demurred.

The action was tried at Belleville on September 11th 1886, before Mr. Justice Armour, without a jury.

Burdett, and Clute, for the plaintiffs.

John Bell, Q.C., and W. H. Biggar, for the defendant.

The principal cases cited in the argument are referred to in the judgment.

November 30th, 1886. ARMOUR, J.—At the common law the sheriff was bound to take pledges in replevin *de prosequendo*, and by the Statute of Westminster the second, the sheriff was bound to take pledges, not only *de prosequendo* but also *de retorno habendo*. In *Coke*, 2 Inst. p. 340, it is said: "If the sheriff return insufficient pledges, they are no pledges within this statute, and in that case the sheriff shall be charged by this Act as if he had taken no pledges at all." And it was held under this Act that an action on case lay against the sheriff for taking insufficient pledges as well as for taking no pledges at all: *Viner's Abridgment*, vol. 16, p. 399; *Moyser v. Gray*, Cro. Car. 446; *Rez v. Lewis*, 2 Term. Rep. 617. And it was held that although pledges (in the plural) was used, the sheriff might take but one, or even the plaintiff himself, because as he was answerable for the sufficiency of the pledges, he did it at his peril: *Gilbert on Replevin*, 89; *Blackett v. Crissop*, 1 Lord Raym. 278; *Hucker v. Gordon*, 1 C. & M. 58. But it was not so decided in actions against the sheriff, but in actions brought by him upon the bond. See as to 11 Geo. II., ch. 19, *Austen v. Howard*, 7 Taunt. 28; *Plumer v. Brisco*, 11 Q. B. 46; *Dunbar v. Dunn*, 10 Price 54.

It seems to me that if the sheriff either under the Statute of Westminster the second, or under 11 Geo. II., ch. 19, should content himself with taking the plaintiff only, or the plaintiff and one surety or pledge only, and these, although good at the time, should turn out to be worthless upon being sued, he would be answerable for taking insufficient pledges, for he chose to disregard these statutes, and did so at his peril.

The bond taken by the sheriff in this case, was the bond of the plaintiff and two sureties, and I think this is what

the statute R. S. O. ch. 53, sec. 11, requires: "Before the sheriff acts on the writ he shall take a bond in treble the value of the property to be replevied, as stated in the writ, which bond shall be assignable to the defendant, and the bond and assignment thereof may be in the words or to the effect of Form 2, in the schedule to this Act, the condition being varied to correspond with the writ." The form of bond given in the schedule, calls for two sureties, and no bond would be to the effect of that given in the schedule which had not two sureties; besides section 17 requires the sheriff to return the names, residences, and additions of the sureties. I am clearly of opinion that the sheriff could only deviate from the form prescribed in this respect at his peril. It being the sheriff's duty to take such a bond, an action will lie against him for not taking one, or for not taking a sufficient one. It being in my opinion the duty of the sheriff to take a bond with two sureties, it was in my opinion his duty to use due care and to exercise a reasonable discretion in inquiring into the sufficiency of the sureties. And he cannot, in my opinion, excuse himself by showing that the plaintiff in replevin, or the plaintiff and one of the sureties was worth the amount of the penalty of the bond at the time it was taken. See *Young v. Brompton, &c., Water-works Co.*, 1 B. & S. 675: *Plumer v. Brisco*, 11 Q. B. 46. I find as a fact that the plaintiff in replevin was not at the time he entered into the bond, sufficient to answer the penalty of the bond, and I find that the sureties were entirely worthless. And I find that the defendant did not use due care, and did not exercise a reasonable discretion in inquiring into the sufficiency of the plaintiff in the replevin, or into the sufficiency of his sureties; and I think, therefore, the plaintiffs are entitled to recover. See *Hindle v. Blades*, 5 Taunt. 225; *Scott v. Waithman*, 3 Starkie 168; *Jeffery v. Bastard*. 4 Ad. & El. 823; *Plumer v. Brisco*, 11 Q. B. 46; R.S.O. ch. 1 sec. 18. The amount of damages which the plaintiffs are entitled to recover in an action such as this, has not yet been very satisfactorily settled.

In *Rouse v. Patterson*, 7 Mod. 387, the rent in arrear and the costs of the replevin were recovered, but these did not exceed the value of the distress.

In *Gibson v. Burnell*, 30 Geo. III., Gould, J., held that the plaintiff was entitled to recover the costs of the replevin and the rent in arrear. (a).

In *Yea v. Lethbridge*, 4 T. R. (1791) 433, the value of the goods distrained was held to be the true measure of damages.

In *Concanen v. Lethbridge*, 2 H. Bl. (1792) 36, the Court of Common Pleas expressly dissented from *Yea v. Lethbridge*, the rent in arrear was £10' 10s., the costs of the replevin £84, the value of the goods £22 4s., the penalty of the bond £50, and an expense of £5 had also been incurred in the proceeding *de retorno*; the plaintiff had a verdict of £100, subject to the opinion of the Court as to the extent of the damages; and the Court held that the plaintiff was entitled to recover all the damages he had sustained by the negligence of the defendant, and was not limited to the penalty in the replevin bond.

In *Evans v. Brander*, 2 H. Bl. (1795) 547, the rent in arrear was £13 18s. 3d., the value of the goods £17 5s. 3d., the costs of the replevin £58 10s., and of the *retorno*, £4 1s. 10d., the penalty of the bond £80, and the damages given by the jury £76 0s. 1d., which were obviously made up of the rent, costs of replevin and *retorno*. On the argument of a motion to reduce the verdict, the Court recommended counsel to agree to reduce the verdict to double the value of the goods distrained, saying that the good sense and justice of the case seemed to be that the sheriff should be liable no further than the sureties would have been if he had done his duty.

In *Baker v. Garratt*, 3 Bing. (1825) 56, the Court approved of *Evans v. Brander*, and a verdict having been rendered by the direction of the Chief Justice for the penalty in the replevin bond, with leave to increase it by the loss the plaintiff had incurred in suing the sureties to

(a) Cited *Yea v. Lethbridge*, 4 T. R. at p. 434.

no purpose, the Court refused to increase it because the plaintiff had given no notice to the sheriff that he intended to sue the pledges.

In *Scott v. Waithman*, 3 Starkie, (1822) 168, Abbott, L. C. J., directed the jury that they could not exceed the value of the goods.

In *Hunt v. Round*, 2 Dowl. (1834) 558, Patteson, J., relieved the sureties in a replevin bond on their paying the rent, if it was less than the value of the goods distrained; if it was more, on their paying the value of the goods distrained, the double costs and the costs of the application.

In *Paul v. Goodluck*, 2 Bing. N. C., (1835) 220, the Court held the plaintiff entitled to recover the penalty of the replevin bond.

In *Jeffery v. Bastard*, 4 Ad. & El. (1836) 823, it was held that the penalty of the bond was the measure of damages.

In *Miers v. Lockwood*, 9 Dowl. (1841) 975, Coleridge, J., approved of *Hunt v. Round*, and granted the same relief on the same terms. See also *Perreau v. Bevan*, 5 B. & C. 284, and *Edmonds v. Challis*, 7 Q. B. 413.

In *Plumer v. Brisco*, 11 Q. B. 46, it was held that the plaintiff could recover the costs of an action against the sureties, although he had given the sheriff no notice of his intention to proceed against them, so long as the damages he recovered were not beyond the penalty in the replevin bond.

This is the state of the authorities as to the damages, and it appears to me that the rule laid down by Lord Loughborough in *Concanen v. Lethbridge*, 2 H. Bl. 36, is the much more reasonable one, and more consonant with principle than the rule which seems to prevail that the penalty of the bond shall be the limit.

The plaintiffs ought to recover all such damages as naturally flowed to them from the wrongful act of the defendant, but I am bound by the rule which limits the damages to the penalty of the replevin bond, and the

replevin bond is now made subject to 8 & 9 Wm. III, ch. 11, sec. 8.

The plaintiffs are, in my opinion, entitled to recover the rent in arrear, the costs of distress, the costs of the replevin suit and incidental thereto, and the costs of the action against the principal and sureties on the replevin bond and incidental thereto.

I see no reason to doubt that the recovery against the parties to this replevin bond was a recovery of the proper amount recoverable against them, and I think that the plaintiffs should recover the same amount against the defendant. This recovery amounted to \$296, and in addition to that there are the costs of the executions issued to enforce the same, which would bring the amount above the penalty in the replevin bond. I, therefore, give judgment for \$300, the amount of the penalty in the replevin bond, with full costs of suit.

A. H. F. L.

This has been carried to appeal before the Divisional Court.—RER.

[COMMON PLEAS DIVISION.]

O'ROURKE V. CAMPBELL.

Seduction—Support of child—Liability for maintenance—R. S. O. ch. 131 sec. 1—Custody and care of child.

The father of an illegitimate child has the right to the custody and care thereof, except as against the mother, who has the right against the father.

To an action under R. S. O. ch. 131, sec. 1. by the plaintiff, the maternal grandmother of an illegitimate female child, for food, clothing, lodging, and other necessities, supplied to the child at the mother's request, the defendant set up as a defence that he demanded the child from the plaintiff and from the mother; and informed them that he would support the child, and had always been ready and willing to do so, and to furnish her with food, &c., yet the plaintiff and the said mother have and still refuse to deliver up the child or allow the defendant to support her.

Held, on demurrer, that this constituted no answer to the action.

The statement of claim alleged that on 20th January, 1881, the plaintiff's daughter, Margaret O'Rourke, was delivered of a female child, not born in lawful wedlock, of which the defendant was the father: that on the 10th November, 1880, Margaret O'Rourke, the said daughter, made an affidavit of affiliation, and deposited the same in the office of the clerk of the peace: that at the request, and by the authority and consent of Margaret O'Rourke, the plaintiff has ever since the birth of the said child as aforesaid, and up to the time of the commencement of this action, furnished such child with all the food, clothing, lodging, and other necessities required by her, to the value of at least \$400: that the said child does not and never did reside with the defendant, nor has she ever been maintained by him in any manner, or to any, the slightest extent: that the plaintiff claims that the defendant is indebted to her for the value of the said necessities by virtue of R. S. O. ch. 131.

The plaintiff claimed \$400, and costs.

The second paragraph of the statement of defence alleged that the defendant having learned that Margaret O'Rourke, mentioned in the plaintiff's statement of claim, was delivered of a child, of which she alleged the defen-

dant was the father, the defendant demanded such child from the plaintiff and the said Margaret O'Rourke, and informed the plaintiff and the said Margaret O'Rourke, that he would support such child; and the defendant has always been ready and willing to support such child, and to furnish such child with food, lodging, or other necessities, yet the plaintiff and the said Margaret O'Rourke, have all along refused, and still refuse, to deliver said child to the defendant or allow the defendant to support such child as aforesaid.

Demurrer to the second paragraph of the statement of defence, wherein it is alleged that the defendant demanded the custody of the illegitimate child in the pleadings mentioned from the plaintiff and from Margaret O'Rourke, the child's mother: and that the same is bad in law, on the ground that the supposed father of an illegitimate child of tender years is not entitled to the custody of such child as against the child's mother or her agent; and the mother, or her agent, is not bound to make an election between giving up the child when demanded and abandoning wholly or in part the right of action for necessities.

On February 25th, 1887, the demurrer was argued.

J. H. Ferguson, for the demurrer.

Aylesworth, contra.

March 1, 1887. ROSE, J.—I think the cases establish:

1. That the father of an illegitimate child has, in this country, the right to its custody and care as against a stranger or person other than the mother. 2. It follows the mother has the right as against the father. 3. The father has the right as against the grandfather; and, I suppose, as against the grandmother. *Re Brandon*, 7 P. R. 347, 351, 353.

I think if the grandmother, on the request of the mother, furnishes the child with food, clothing, lodging, and other necessities, the child is still in the custody and control of the mother, even if the mother does not reside in the house

with the child. If authority be needed for such a proposition I think it is afforded by *Regina v. Nash*, 10 Q. B. D. 454.

The statute gives a right of action in express terms to any person who furnishes food, clothing, and lodging, or other necessities to any child born not in lawful wedlock "against the father of such child, "if the child was a minor at the time the necessities were furnished, and was not then residing with his or her reputed father and maintained by him as a member of his family:" R. S. O. ch. 131, sec. 1.

The plaintiff is such a person as by the statute a right of action is given to ; the child is a minor, and was not then residing with the defendant.

What defence does the statement of defence offer ?

It avers a demand upon the plaintiff, the maternal grandmother, and upon the mother, for the person of the child, and a refusal by both.

As against the mother the defendant is not entitled to the custody and control of the child ; and it is not averred that the grandmother has the custody and control, apart from the mother. The plea rather assumes that the control is still with the mother.

Even as against the grandmother, would it be any defence that the father desired to place it with another stranger, and the grandmother refused to permit him to do so ? Must not the father aver that he demanded the child for the purpose of placing it in his home to reside there and be maintained as a member of his family ? I am inclined to think this is so.

The defendant further says he is, and always has been, ready and willing to support the child, and to furnish such child with food, &c., and has so notified the plaintiff and the mother.

Without the other averments, I do not think this affords any defence even as to the amount claimed.

As against the grandmother, not acting under the direction of the mother, no doubt he could shew that he could maintain the child for less elsewhere, and had so notified

her, and such evidence would be well offered in mitigation of damages ; but here there is no such defence offered.

Even if good on other grounds, the defence does not in terms cover the whole time since the birth of the child ; and the plaintiff would be entitled to recover until demand made.

For these reasons, I think no defence is offered by the statement on the record, and allow the demurrer, with costs in the cause to the plaintiff in any event.

The following authorities may be referred to in addition to those above noted : *Simpson* on Infants, pp. 126, 127, and cases there referred to ; *Eversley's Law* of the Domestic Relations, pp. 621, 622, and cases there referred to ; *Monohan v. Oke*, 1 A. R. 268.

Judgment for plaintiff.

[COMMON PLEAS DIVISION.]

PALMER V. MILLER ET AL.

Principal and agent—Claim for commission—Equitable estoppel—Rule 321 O. J. A.

The defendants, type founders in Edinburgh, employed plaintiff's father as their agent in Canada to be paid by a commission "on the receipts, i. e. in cash, bills, and value of old metal received." He also had a small guaranteed salary. It was understood that as soon as the father got too old to manage the business the plaintiff was to succeed him; and in 1880 this was effected. In 1882 the plaintiff was dismissed. He wrote complaining thereof, but said the sting was taken out of it by reason of a yearly allowance to the father of \$1,250 for which he was grateful. In January, 1884, the defendants annoyed at a loss occasioned by plaintiff's brother threatened that the father's allowance would be stopped; and the father wrote plaintiff that he could make any claim he wished. The plaintiff then made a claim on defendants, being for commission on sales, made before, but the amount thereof was received after plaintiff had left defendants' employment. On defendants notifying the plaintiff that if the claim were pressed the father's allowance would be discontinued, nothing farther was done by plaintiff until after his father's death when the claim was pressed and this action commenced. It appeared that had the claim been pressed the allowance would have been stopped; and that defendants paid the allowance under the belief that the claim would not be pressed.

Held, that the plaintiff was not entitled to recover.

Per ROSE, J. The plaintiff was equitably estopped from maintaining the action.

Per CAMERON, C.J. The plaintiff by the express terms of the contract was only entitled to commission on moneys received during his employment, and not afterwards.

THIS was an action tried before Cameron, C.J., and a jury, at Toronto, at the Fall Assizes, 1886, when a verdict was given, and judgment directed to be entered for the plaintiff, with a reference to the Master to take accounts.

In Michaelmas Sittings, *W. M. Hall* moved on notice to set aside the judgment entered for the plaintiff, and to enter a judgment for the defendants.

During Hilary Sittings, February 14th, 1887, *Robinson Q.C.*, and *W. M. Hall*, supported the motion, and referred to *Carr v. London and North Western R. W. Co.*, L. R. 10 C. P. 307; *Walker v. Hyman*, 1 A. R. 345; *Merchants Bank v. Lucas*, 13 O. R. 520; *Bigelow on Estoppel*, 4th ed., 568; *Watkins v. Rymill*, 10 Q. B. D. 178; *Leather Munufac-*

turers Bank v. Morgan, 117 U. S. 96; *Millar v. Toulmin*, 17 Q. B. D. 603.

Osler, Q. C., and T. P. Galt, contra, referred to *Inchbald v. Western Neilgherry Coffee &c. Co.*, 17 C. B. N. S. 733; *Prickett v. Badger*, 1 C. P. N. S. 297; [GALT, J., referred to *Lockwood v. Levick*, 8 C. B. N. S. 603]; *Smith v. Thompson*, 8 C. B. 44.

March 12, 1887. ROSE, J.—The claim is for commission on sales made by the plaintiff while in the defendants' employ, the amount however being received by the defendant after he left their service.

The plaintiff contends he is entitled, under his agreement with the defendants, to commission on the receipts from all sales made by him, while the defendants contend that he is entitled to commission on the receipts during the term of service, and not on any which came in after he had left their employment.

Questions arose on the construction of the contract as evidenced by the letters; and as to the plaintiff's right to press his claim in the face of certain conduct, which I will detail, the defendants claiming that by such conduct he was and is estopped in equity.

It appears that the defendants, typefounders, doing business in a large way in Edinburgh, prior to the year 1871 sent out the plaintiff's father to this country to manage their establishment in Canada.

By letter, dated 9th May, 1881, they gave the terms of the employment as follows: "You are to debit the business with 2½ per cent. as your commission on Mr. Brown's remittance of £545 5s. last month. Your commission is to be on the receipts, i. e., on the cash, bills, and value of old metal received, same as Mr. Gibbs, not on the amount of sales as you put it." Mr. Palmer had also a small guaranteed salary.

There appears to have been an understanding that when Palmer, sr., became too old to attend to the business, his son Sydney, the plaintiff, should succeed him; and this

was effected in 1880. The letter from Palmer, the father, to the defendants of date May 21st, 1880, contains the announcement to the defendants.

The plaintiff says that by a private arrangement with his father he was to pay him \$2,000 a year for ten years, and he the plaintiff was to receive all commissions on receipts after his father's resignation. This was not communicated to the defendants, and the statements sent to the defendants did not give them notice of it.

In the year 1882, the plaintiff was superseded by the appointment of one Paterson, as agent.

In the statements sent to the defendants, the plaintiff made no claim such as he now sets up; nor did he until March 22nd, 1884.

The reason for such silence will appear from the following evidence:

On the 29th March, 1882, the plaintiff wrote complaining of being dismissed, but added: "However, I do not wish to upbraid you, or complain in any way, as you have taken the sting out of anything I wished to say by your allowance to my father of \$1,250 per annum; and I am very grateful to you for it."

On the 25th of January, 1884, the defendants annoyed at a very heavy loss they had made through a brother of the plaintiff, wrote to the father as follows: "We intimated some time ago to you, that if further loss arose to us from his" (the son's) "mismanagement, we would not be able to continue to you the allowance we have been paying you. The annexed" (letter) "is quite sufficient to warrant us in carrying this out, and we now give you notice that it will not be paid any longer."

From other correspondence the loss would appear to have been about £10,000 on business in San Francisco.

The father then, it appears, wrote to the plaintiff, who had gone to San Francisco, to assist his brother, enclosing the defendants' letter, and telling him he could have no further objection either to his starting up in business or *making any claim on them.*

Accordingly on receipt, and on the 22nd of March, the plaintiff made his claim for the first time.

On the 19th June, 1884, the defendants replied, accounting for delay, by saying that they had waited until they had communication with Toronto.

After entirely repudiating the claim for reasons therein given, they add : "As this seems to be a matter between you and your father, might we be allowed to suggest that you should settle it between you. At all events, it must be evident to you that should you be so ill-advised as to cause us any trouble or expense in this matter, your father is bound to suffer, and any expense incurred will be deducted from his allowance, or cause it to cease altogether."

Apparently the defendants had not acted upon their letter of January, but had continued the payments.

I make the following extracts from the plaintiff's evidence at the trial : "Q. When did you first make a demand for this commission you are asking for now? A. In March, 1884. Q. That is two years after you left the defendants' employ? A. Pretty nearly two years. Q. And why didn't you go on with it then; did you do anything further than make a demand at that time? A. Well, they wrote to me if I pressed the suit they would stop the annuity they were paying to my father. Q. Then they were paying your father an annuity as well, when you left their employ? A. Yes, they were paying him \$100 per month. Q. How long did he receive that? A. Up to the time of his death. He died on October the 2nd of last year (1885). * * * Q. Why didn't you make the demand before that? A. Well I was under a certain amount of coercion. I understood they wrote my father and said they would give him a retiring allowance of \$100 a month, but if they were given any trouble by his sons it would be stopped."

Referring to the settlement with Paterson when he handed the business over to him, he is asked : "Q. Tell me why you did not speak to him about it? What is the reason you did not speak to Mr. Paterson about the commission that was yet to be earned? A. Well, my father

was getting an allowance from the firm, and I was afraid, if I made any trouble, it would affect him. * * *

Q. Did he" (the father) "make any request to you about this commission? A. I had mentioned to him I was entitled to that, because I had a large amount of sales. I told him that I should be entitled to commission. He did not want me to do anything. In fact, he persuaded me to leave Toronto altogether, in case I should be considered a menace to the business. Miller & Richards were afraid we were going into business for ourselves. In fact, if that allowance had not been made to my father I should have gone into business here. I was afraid of injuring my father, and that was what kept me from going into business here, * * *

Q. Did you see this letter (referring to letter from defendants of 25th of January). A. My father sent me this, and he told me he could have no further objection either to my starting up in business, or making any claim on them. * * *

Yes that is the reason I pressed the claim. * * *

Q. So long as your father was living you made no active demand for the claim you are now making? A. I only made one demand. Q. You did not press that; you waited until now; you did not prosecute your action until after your father's death. A. Yes, my father was still receiving the allowance of \$100 a month, and I made no complaint or demand until after he died."

I extract from the evidence of the defendant, John Ambler Richards, taken on commission: "We gave him a retiring allowance afterwards. It was rather a gratuitous allowance, not in lieu of anything. * * * It was after his son left that he got it. Q. In consideration of his long services? A. No, it was not; it was more to get rid of his future opposition. That was our own private reason, although we might not have mentioned it. * * * We asked his father what the meaning of this was, and he gave us a letter saying it was not correct, and that there was no such claim. We wrote back saying that

unless that claim was withdrawn, we would withdraw the gratuitous allowance. However, the thing fell through. We lost sight of it, and the claim was discontinued again. It slipped over two years, and then after that letter twelve or fifteen months passed before there was another letter. His father's death took place; *but if we had thought there was such a claim, do you think we would give him this sum of money every year?* * * Q. I think as long as he was alive those reasons existed? A. He could not have compelled us to make the allowance in any way. * * Q. On the 1st April you went on paying the allowance, and did so until Mr. Palmer's death, notwithstanding that in your letter of January you said you would not pay it any more? A. Yes. Q. Why was that? A. We thought his father's influence would have more effect upon him than anything else."

It is clear from this evidence that had the claim been pressed the allowance to the father would have been stopped.

It seems equally clear that the defendants believed that the claim would be withdrawn if they continued the allowance, and that the plaintiff in order to induce the defendants to continue the allowance did not press the claim; and that in consequence of such silence and want of action on the plaintiff's part, after receipt of the letter of the 19th of June, 1884, the defendants gave the father from \$1,200 to \$1,500.

The plaintiff's claim was uncertain, both as to its validity and amount. The father's life might, so far as the parties knew in 1884, have continued for many years. Can the plaintiff be allowed after the father's death to make the claim, or must he not be held to have elected when he received the letter of the 19th of June, to abandon his claim, and allow the defendants to pay, and his father to receive, \$100 a month during his life?

In *Ex p. Adamson, Re Collie*, 8 Ch. D. 807, James, L. J., said, at p. 817: "Nobody ought to be estopped from averring the truth or asserting a just demand, unless

by his acts, or words, or neglect, his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he had said or done, or omitted to say or do."

I make the following extracts from *Herman on Estoppel* (1886): Sec. 731. "Equitable estoppels only arise where the conduct of the party estopped is fraudulent in its purpose, or unjust in its results; and this forms the distinction between the Common Law doctrine of estoppel, and that which has grown up under the influence of equity, in modern times." Sec. 954. "A man who connives at a deceit which he might have exposed, will be justly required to bear the consequences instead of allowing them to fall on the injured party. * * So, where a party stands by and sees another convert his own property to his own use, without protest, and such knowledge of their use can be shewn, he is estopped from claiming the property:" *Hogan v. City of Brooklyn*, 52 N. Y. 282.

In that case a corporation had a contract with a builder under which in case of default they had the right to use any material in completing the work as was found upon the works. The plaintiff saw, without protest, the corporation use his material. Knowing the terms of the contract he was held estopped from making a subsequent claim.

Sec. 986. "Where a person entitled to a right in the nature of an easement encourages another, though passively, to acquire title and expend money on the assumption that that right will not be asserted, he will not be permitted in a Court of Equity to assert his right to the prejudice or injury of those who have been encouraged, by his acquiescence, to expend money on the faith that his rights will not be exercised to defeat the just expectation upon which such expenditures have been made."

Sec. 991. "These estoppels arise where a party by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to

act on that belief and so alter his own previous position.
* * It is a most valuable doctrine for the promotion of justice; but it can have no application except where the party invoking it can shew that he has been induced to act, or refrain from acting by the acts or conduct of the adverse party under circumstances that would naturally and rationally influence ordinary men. It can therefore only be set up and relied on by a party who has been actually misled to his injury; for if he is not so misled he can have no ground for the protection that the principle affords."

Of course there is here clear evidence, that the defendants acted on the silence or acquiescence, or fraudulent concealment of the plaintiff's design by paying out large sums of money.

I may perhaps be allowed to call attention to the learned author's view of the result of the authorities as giving support to the position I ventured to take in dissenting in *Merchants Bank v. Lucas*, 13 O. R. 520, on the question of the necessity of giving positive evidence of being misled to one's hurt.

Sec. 1049. "It is contrary to the established principles of equity, that he should enjoy the benefit, while he rejects the condition of the gift."

Sec. 1061. "Acquiescence in a transaction may bar a party of his relief in a very short period. Thus, if one has knowledge of an act, or it is done with his full approbation, he cannot afterwards have relief. He is estopped by his acquiescence, and cannot undo that which has been done. So if a party stand by and see another deal with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interests are affected. His silence is acquiescence, and it estops him."

The learned text writer gives the above passages as the result of a large number of cases, English and American. I have not looked at very many of them, as the propositions seem to me to be just and fair.

I find in *Bigelow* on Estoppel, 3rd ed., p. 504, the following: "Again this estoppel proceeding from wrongful silence may arise against the assertion of a right known to exist by the party alleging it, as well as where the right is concealed from him; tacit agreement to forego a right known by both parties to exist, having the same effect as the non-disclosure of a right not known by one of them to exist."

In *Walker v. Hyman*, 1 A. R. 345, Burton, J. A., at p. 351, quotes from *Swan v. North British Australian Co.*, 2 H. & C. 175, at p. 188, the observations of Cockburn, C. J., as follows: "To bring a case within the principle established by the decisions in *Pickard v. Sears*, and *Freeman v. Cooke*, it is in my opinion essentially necessary that the representation or conduct complained of, whether active or passive in its character, should have been intended to bring about the result whereby loss has arisen to the other party, or his position has been altered."

In *Gregg v. Wells*, 10 A. & E. 90-97, the learned Chief Justice says, referring to *Pickard v. Sears*, that "The principle of that case may be stated even more broadly than it is there laid down. A party, who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

It seems to me beyond question that here the plaintiff intended to lead the defendants to believe that he abandoned his claim, and did so, in fact, lead them into that belief: that he so acted or maintained silence to induce them to act upon such belief by paying money to his father, and that they acting upon such belief did in fact pay large sums of money to his father; and that after lying by until he or his father had got out of the defendants all the money which would be paid, it was dishonorable in him to renew his claim and bring this action: that such course was against equity and good conscience, and should not be allowed to avail the plaintiff; and that a recovery in

such an action would be contrary to the principles by which the laws of the civilized world are administered.

There was no finding by the jury on this question, even if had been proper to have left such a question to the jury.

We have power under Rule 321, if satisfied that we have before us all the materials necessary for finally determining the question, or for awarding relief, to give judgment accordingly, instead of sending the case down again for a new trial. As to the power of the Court of Appeal in England to enter judgment against the findings of the jury, see *Mellar v. Toulmin*, 17 Q. B. D. 603, cited by Mr. Robinson. I think we have before us all the necessary materials, and may give judgment in accordance with our views.

In the view I have taken it is unnecessary to consider the other grounds of motion.

I would require more careful consideration before conceding that the case as to the agreement was not one for the jury, and that the finding of the jury as to it could be disturbed.

I think the order must be made absolute to set aside the verdict and judgment, and enter a judgment for the defendants dismissing the action, with costs.

CAMERON, C. J.—I concur in the opinion that the defendants are entitled to judgment, but think they are so entitled because by the express terms of the contract as disclosed by the correspondence between the parties the plaintiff was only entitled to commission on the money received during his employment, and not afterwards. That such was the interpretation the plaintiff put upon the contract is manifest by his making no claim in respect of his commission until after the lapse of two years from the time of his leaving the defendants' employment.

The grounds on which my learned brother Rose concludes the equitable principle of estoppel should apply to bar the claim, are also very strong. But at present I rest my opinion on the terms of the contract itself.

The verdict of the jury must therefore be set aside, and the case is one in which the power given to the Court under Rule 321 should be exercised to enter judgment for the defendants, dismissing the plaintiff's action, with costs.

GALT, J., concurred.

Motion allowed.

[COMMON PLEAS DIVISION.]

THORNE V. WILLIAMS.

Ejectment—Deed, alteration of—Validity—Equitable right to possession—Adding party.

In an action to recover possession of land it appeared that one of the deeds forming a link in the plaintiff's title had been altered by the grantor's agent under authority of a letter from the grantor. The alteration consisted in the agent rewriting the first two pages and substituting a new grantee. The letter was not under seal; and the deed was not re-executed or re-delivered by the grantor. The plaintiff proved that he had a good equitable right to possession.

Held, that the deed was void at law; but that the plaintiff was entitled to recover on his equitable title. Leave was also granted to add the owner of the legal estate as plaintiff if necessary.

THIS was an action for the recovery of possession of land, tried at the Winter Assizes of 1887, before Cameron, C. J. without a jury, at Toronto, when judgment was entered for the plaintiff, the defendant shewing no title.

A deed in the plaintiff's claim of title was one from Burkitt to Fayle. This deed had been altered by Burkitt's agent after execution under authority of a letter from Burkitt to the agent.

The alteration consisted in the agent re-writing the first two pages and substituting a new grantee.

This letter was not under seal, and the deed was not re-executed or re-delivered.

The plaintiff had a good equitable right to possession.

During Hilary Sittings, *McCulloch* moved on notice to set aside the judgment entered for the plaintiff, and to enter judgment for the defendant.

During the same Sittings, February 23, 1887, *McCulloch* supported the motion. The plaintiff's title is clearly defective, the deed from Burkitt to Fayle being void. The defendant is in possession, and cannot be disturbed unless plaintiff can shew a perfect title. The Court cannot grant leave to add Burkitt as a plaintiff, judgment having been entered: *Elphinstone, Norton & Clarke* on Deeds, p. 17 *et seq.*; *Shep. Touch.*, p. 68; *Powell v. Duff*, 3 Camp. 181; *Perkins* on Conveyances, p. 24; *Hibblewhite v. McMorrine*, 6 M. & W. 200; *Davis v. Cooper*, 13 M. & W. 343; *Weekes v. Maillardet*, 14 East 563; *French v. Patton* 9 East 351; *Co. Litt.*, 52a; *Martin v. Hanning*, 26 U. C. R. 80; *Attorney-General v. Corporation of Birmingham*, 15 Ch. D. 423.

J. E. Robertson, contra. The plaintiff's title is a good equitable title, which is sufficient even if the deed is void. The plaintiff should be allowed to amend by adding Burkitt. In any event the plaintiff should have judgment under sections 17 and 18 of the Ejectment Act, as a person "entitled in justice to be regarded as the proprietor of the land * * but that he cannot shew a perfect legal title" thereto: C. S. U. C. ch. 27; R. S. O. ch. 51, secs. 26, 27. He referred to *Sayles v. Brown*, 28 Gr. 10; *Sommerville v. Wray*, 28 Gr. 618.

March 11, 1887. ROSE, J.—The defendant moves against the judgment herein on one ground only, namely, that one of the deeds forming a link in the plaintiff's chain of title was void; and, therefore, the plaintiff could not recover possession of the land.

The deed was altered by an agent of the grantor under authority contained in a letter from the grantor to the agent.

The alteration was material, consisting in practically rewriting the first two pages of the deed after execution, substituting the name of a new grantee.

The letter not being under seal, and there being no acknowledgment or delivery by the grantor, it is clear the deed was void at law.

The grantee, however, became owner of the equitable estate, or interest in, and entitled to the possession of the land; and the learned Judge held that such right and title passed to the plaintiff, who was entitled to recover.

The cases cited by the defendant no doubt shew that on such a title the plaintiff, in the old action of ejectment at common law, would have failed.

It is also clear that the giving the Chancery Division the right to try what were known as actions of ejectment conferred no new jurisdiction on that Division. See *Adamson v. Adamson*, 7 A. R. 592, at p. 606, per Burton, J. A.; *White v. Nelles*, 11 S. C. R. p. 611, per Gwynne, J.; but that does not entitle the defendant to succeed.

As I understand the law now with regard to the right to recover possession of land it is this, that once it is shewn that a party is entitled to possession of land, whether such right be called equitable or legal, the Court will give him possession.

It is not correct to say that one cannot recover possession upon an equitable title, without getting in the legal estate.

Take the case I put to defendant's counsel on the argument: An owner of land enters into an agreement for the sale of land, immediate possession to be given, but the deed not to be given for say ten years, and then refuses to give possession. Can one doubt that upon such facts the Court would order possession? And would it paralyze the arm of the Court that a stranger had, in the meantime, obtained possession of the land?

In *Doe d. Barker v. Crosby*, 7 U. C. R. 202, it was held that a party entitled to possession under an agreement with the owner of the legal estate could recover against such owner, although the owner had the legal title.

In *Adamson v. Adamson*, Patterson, J.A., expressed the view that there—as the law was when the action was commenced (1878)—the plaintiff was entitled to recover in respect of his equitable estate. Burton, J. A., doubted, and thought legislation necessary.

If necessary in this case the plaintiff must have leave to add the owner of the legal estate as plaintiff, as the right to recover is in either one or the other. See *Henderson v. White*, 23 C. P. p. 78; but in my opinion such amendment is not necessary.

I have not found it necessary to consider Mr. Robertson's argument as to the plaintiff's right to recover as a person "entitled in justice to be regarded as the proprietor of the land * * but that he cannot shew a perfect legal title thereto," &c., having served a notice under the provisions of the Ejectment Act, secs. 17, 18, C. S. U. C. ch. 27; R. S. O. ch. 51, secs. 26, 27.

The motion on the ground taken is without merits, and must be dismissed, with costs.

CAMERON, C.J., and GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

HARTNEY V. THE NORTH BRITISH FIRE INSURANCE
COMPANY.

Fire insurance—Amount of loss—Goods destroyed—Evidence—Proofs of loss, sufficiency of—R.S.O. ch. 162, sec. 2—Without prejudice—Action prematurely brought.

Action on a policy of insurance against fire on a stock of goods. M., the local agent, through whom the insurance was effected, stated that he had at the time examined the premises, and considered, from the size of the store, the appearance of the goods, and the stock book, there were goods to the amount insured. The fire occurred on the 20th October, and all the goods on the premises were destroyed. On the same day the defendants' inspector came and saw plaintiff, who furnished him with a statement shewing the amount of the stock in May—the insurance having been effected in June—the sales since then, and the invoices of goods purchased up to the fire. The inspector gave plaintiff a form from which he was to, and did fill in, the proof papers sent him by the inspector; and which plaintiff enclosed to defendants in a letter of 27th October, informing them that, if not correct, he would have same made out to their satisfaction. On 31st October defendants replied that they thought the loss, in place of \$13,005, the amount claimed by plaintiff, should be \$11,734.90; adding: "This sum, we consider, not only reasonable, but liberal, and which we are liable for, without any prejudice to or waiver of, any condition of the policy." The plaintiff replied that his claim was a just and honest one, but if settled at once he would accept a deduction of \$400. The defendants then wrote that theirs was a fair and liberal offer, and pointed out what they considered objectionable items in plaintiff's claim. The plaintiff then made and sent to defendants a statutory declaration of loss according to the above form. The defendants then replied, stating that without admitting, but denying any liability, they drew attention to alleged informalities in not specifying the items of loss in detail, and in not giving a detailed statement of the claim. The plaintiff then furnished defendants with a statutory declaration giving such detailed statement. Nothing further was done, and this action was brought. The defendants set up a number of defences, amongst which was arson, and imputing fraud and misconduct to the plaintiff, but no evidence was given in support of them.

Held, there was sufficient evidence of the amount of the goods at the time the insurance was effected: that the goods insured were those destroyed by the fire; and that under sec. 2 of the Fire Insurance Policy Act, R. S. O. ch. 162, no objection could be raised to the proofs; and in any event the proofs were sufficient.

Held, also, that the letter of the 31st October was properly admitted in evidence, for it was not stated to be without prejudice generally, nor was any objection taken to its reception at the trial, the defendants by the letter merely claiming that it should not be deemed a waiver of any condition of the policy, and both parties acted on this view.

It was objected that the action was premature, because, by a condition of the policy sixty days was given for the payment of a claim, and the action was brought within such period; but *held*, that as the policy herein was only subject to the statutory conditions by which the period is thirty days, the objection could not be sustained.

THIS was an action on a policy of insurance, effected by the plaintiff on a stock of goods in his store at Arnprior.

The defendants set up no less than thirty-one grounds of defence, many of them having no bearing on the subject; and many others, the proof of which lay on the defendants, in support of which no evidence was offered.

The action was tried before Rose, J., and a jury, at Pembroke, at the Fall Assizes of 1886.

At the close of the evidence a number of objections were made by the defendants.

His Lordship stated: "At present I over-rule the objections. The finding of fact will be as to the amount of loss, and whether or not there has been any fraud or fraudulent conduct on the part of the plaintiff which would disentitle him to recover. Are those the issues of fact as you understand them?" Mr. Kerr, for the defendants: "I suppose so."

His Lordship then charged the jury. When the jury returned the learned Judge asked them: "Do you find the plaintiff committed any fraud upon the defendant company?" To which they answered, "We find no fraud!" Q. "What claim do you allow?" A. "The claim for the full amount."

It was subsequently arranged that the learned Judge should direct judgment in favour of the plaintiff; but that the whole matter should be argued before the Divisional Court.

In Michaelmas Sittings, *J. K. Kerr*, Q. C., obtained an order *nisi* to set aside the verdict and judgment entered herein, and to enter judgment for defendants.

During Hilary Sittings, February 18th, 1887, *J. K. Kerr*, Q. C., and *Walker* (of Ottawa), supported the order, and referred to *Pirie v. Wyld*, 11 O. R. 422; *Taylor* on Evidence, 8th ed., p. 688, sec. 795; *Williams v. Thomas*, 2 Dr. & Sm. 29, 37; *Carter v. Niagara District Mutual Ins. Co.*, 19 C. P. 143; *Kerr v. British America Ins. Co.*, 32 U. C. R. 569, 571-2; *Lindsay v. Lancashire Fire Ins.*

Co., 34 U. C. R. 441, 449; *Cameron v. Canada Fire and Marine Ins. Co.*, 6 O. R. 392; *Robins v. Victoria Mutual Ins. Co.*, 6 A. R. 427, 439; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Smith v. Queen Ins. Co.*, 1 Hannay N. B. 311; *Harris v. Waterloo Mutual Fire Ins. Co.*, 10 O. R. 718.

Osler, Q. C., and *Wallace Nesbitt*, contra referred to *Smith v. City of London Ins. Co.*, 11 O. R. 38; *Mason v. Agricultural Mutual Assurance Association*, 18 C. P. 19; *Thompson and Merriam* on Juries, secs. 152, 206, pp. 134, 212; *Goring v. London Mutual Fire Ins. Co.*, 10 O. R. 236.

March 12, 1887. GALT, J.—The policy has certain conditions printed on it; but it has not the statutory conditions, nor is there any statement that the conditions so printed are variations, so that the policy is subject to the statutory conditions only.

At the close of the evidence several objections were made by Mr. J. K. Kerr, Q.C., on behalf of the defendants, which were overruled; but being legal objections they were argued before us, and I shall consider them.

The first and second objections are, that there was no evidence of loss, or of the amount of loss, of the plaintiff, to establish the plaintiff's claim.

The evidence on which the plaintiff relied was that of two witnesses, both of them connected with the defendants; one of them, McNabb, is the agent resident at Arnprior, and through him the application was made, who stated that he went to examine the premises; and in answer to the question, "What judgment did you exercise as to there being that quantity of goods in stock? I suppose you don't insure unless you have goods that can be insured?" stated "My impression from the size of the store and the appearance of the goods in the various buildings, and also from the stock book that was shewn to me, was that the amount was safe enough. Q. Then you saw the stock book and goods in the store, and you knew the size of the buildings,

and from that you thought the insurance was safe enough?

A. Yes. Q. You thought there was that value of goods?

A. Yes; I believed the stock book, and I had no reason to doubt it from the appearance of the store."

It appears to me there could be no better evidence as to the stock at the time when the policy was effected.

Then as respects the loss, he is asked: "Do you remember the fire? A. Yes. Q. I believe there was a total loss, or almost total loss, the buildings were all burned; A. Yes. Q. And the goods appeared to be all burned, or were there any goods saved? A. All I know about the salvage is what was sold by sale and what turned up in the car."

I may here mention that the sale referred to was of very trifling amount.

This witness does not appear to have had anything to do with the settlement of the amount of loss.

The other witness was Mr. Ahern, the inspector of the defendants. He had nothing to do with the inception of the policy; but was sent to Arnprior, immediately after the fire, to enquire into the circumstances.

The fire took place on the 20th October; the witness arrived the next day; he saw the plaintiff and his daughter that afternoon, and arranged to meet them in the morning. The following is his evidence: "Whom did you meet? A. Mr. Hartney and Miss Hartney. Q. And was there anything done? A. Yes; they produced a statement shewing what stock they had in the month of May (the policy was effected about 11th June, 1884); and they produced a book shewing the sales since that date; and they produced invoices of the goods purchased up to the date of the fire."

The witness then details other particulars, which it is unnecessary to state. He then left with them a form shewing the manner in which the claim should be made out. He then left.

This is all the evidence to which it is necessary to refer on the objections now under consideration, viz., as to the fact of the loss being of the property assured (the amount will be hereafter considered).

I think there can be no question it was amply sufficient to satisfy the jury that Mr. Ahern, as inspector of the defendants, was convinced that the property insured had been destroyed.

The third objection is, the plaintiff did not furnish the defendants with proofs of loss as required by the statutory conditions to which the policy was subject.

The fourth objection is, the plaintiff did not deliver to the defendants as particular an account of the loss as the nature of the case permitted.

It appears to me these objections are not entitled to any weight.

I have already shewn that Mr. Ahern left with the plaintiff a form in which the account was to be made out. After his return a letter was addressed to plaintiff, dated 24th October, enclosing two claim forms "which please fill up and sign; you will please make your claim in accordance with the statements taken from your books and given by yourself and your daughter to our Mr. Ahern, a copy of which we enclose you in case your own might be mislaid."

In reply to this letter the plaintiff did, on the 27th October, furnish the defendants with a claim made out in the manner required. This was enclosed in a letter of that date: "Enclosed you will find claim papers filled up according to your instructions. If you don't find them satisfactory in every way you will please let me know by return of mail, and I will have them made out to your entire satisfaction. Please, if not found correct, send me blank claim form."

In reply to this the manager of the defendants, Mr. Ewing, wrote, on 31st October, not in any way disputing the right of the plaintiff, but contending that in place of \$13,005 his claim should be \$11,734.90. "This sum we consider not only reasonable but liberal; and which we are liable for, without any prejudice to, or waiver of, any condition of our policy."

This letter forms the basis of that part of the rule which asks for a new trial, the learned counsel contending that

as it was written "without prejudice" it should not have been received in evidence.

We had occasion to consider this question in the case of *Pirie v. Wyld*; 11 O. R. 422, and had this letter been stated to be "without prejudice" generally, and had objection been taken to its reception at the trial, I should have been of opinion that it was inadmissible; but there is no note that any objection was taken, and all that the defendants claimed in the letter was, that the offer therein contained should not be considered a waiver of any condition in their policy; and both parties acted on this view, for we find the plaintiff in reply stating that his was a just and honest claim, but offering to accept a deduction of \$400 if it was settled at once. The defendants then, on 11th November, wrote asserting theirs was a fair and liberal offer, and pointing out what they considered objectionable items in the plaintiff's claim.

All negotiations for a settlement appear then to have ceased.

A letter was put in by the plaintiff from the defendants, dated 8th December, 1884, to which I shall hereafter have occasion to refer, in which it is said: "As already stated the company does not admit but denies all liability in the premises."

In his charge to the jury his lordship refers to the letter of 31st October without any objection being made. All that the learned counsel did, was to request him to hand the letter of 8th December to the jury, which he declined.

It appears to me, under these circumstances, the application for a new trial, based on the reception of the letter of 31st October, must be refused.

To return to the consideration of the second and third objections After the letters, to which I have referred, viz., those containing the offer and refusal, we find that, on the 22nd November, the plaintiff made a statutory declaration in support of his claim embodying the particulars which had previously been furnished in the form given by Mr. Ahern, which he forwarded to the defendants.

On the 8th December the defendants' agent wrote as follows: "This company has received a purported claim from you under policy No. 712,950. Without admitting, but denying any liability by the company to you under this policy, and, under the facts, the company claims to draw your attention to the informalities on the face of the claim which does not specify the loss in detail under each item of the policy. It is also necessary you should state in detail the nature of the charge. As already stated the company does not admit, but denies all liability in the premises."

This is rather an extraordinary letter, after what had taken place between the parties; but of course, under the reservation contained in the letter of 31st October, the defendants were entitled to make it, and the plaintiff made no objection, but on the contrary, he did, on 31st December, 1884, furnish them with a statutory declaration, setting forth all the particulars of his claim.

To this the defendants made no reply; and, on the 2nd February, 1885, this action was commenced.

I have already stated this policy is subject to the statutory conditions only.

By section 2 of the Fire Insurance Policy Act it is enacted: "Where by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this Province, as to the proof to be given to the Insurance Company after the occurrence of a fire have not been complied with: or *where, after a statement or proof of loss has been given in good faith by or on behalf of the insured, in pursuance of any proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions*, or does not, within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time: or where, for any other reason, the Court or Judge before

whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions—no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof (as the case may be) shall, in any of such cases, be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into.”

It is to be observed that this provision has reference not only to contracts of insurance subject to the statutory provisions as to proofs of loss only, but applies to all contracts of insurance, notwithstanding they may contain provisions varying from the statutory provisions as to proofs of loss, so that in all cases the enactment governs proofs of loss.

To apply this law to the present case.

The plaintiff notified the defendants of his loss the morning of the fire; he furnished the inspector with information as to the amount of his loss; he sent in his claim papers in accordance with the instructions of the inspector. After his dispute with the defendant as to the settlement of his claim, he furnished a statutory declaration containing his statement of loss in the same form; and this being objected to, on the grounds that it was not sufficiently explicit, he furnished another statutory declaration containing full particulars, and to which no objection was made.

I do not think there could be a case to which the provisions of the statute should apply if they do not prevail in the present instance.

There is also another provision which is, in my opinion, conclusive against the contention of the defendants. There are no less than thirty-one statements of defence pleaded, and, among these, are two charges of arson, viz., the 9th and 27th. No evidence whatever was given in support of these, or of any other of the grounds of defence imputing misconduct and fraud to the plaintiff. The statute expressly enacts

“that when the company objects to the loss upon other grounds than for imperfect compliance with such conditions” (that is as respects proof of loss) “no objection to such proof shall be allowed to prevail.”

The effect of the statute is, that in cases where the company dispute their liability on such grounds as are set forth in this case they shall not be at liberty, after failing in such defence, to try and take advantage of some technical want of proof to defeat a just claim. The provisions of the statute cover all the grounds of objection taken by the rule as to the proofs of loss ; but, even if they did not, I think the proofs and certificates were amply sufficient. The case went fairly to the jury. The questions to be submitted to them were mentioned by the learned Judge to counsel before he charged the jury, viz., “The finding of fact will be as to the amount of loss, and whether or not there has been any fraud or fraudulent conduct on the part of the plaintiff which would disentitle him to recover.” The jury answered both questions in favour of the plaintiff, and the evidence fully sustains their finding.

Then as to the action being premature. The claim papers were sent to the defendants on 31st December, and the action was not commenced until the 3rd February following. There is a condition in the policy that payment of claims shall be made within sixty days after production of the oath or affirmation of the claimant ; but by the statutory condition the period is thirty days, and, for the reasons already given, the policy is subject to the statutory conditions only. This objection therefore fails.

An objection is taken as to the constitution of the jury, but I confess I am entirely at a loss to see on what grounds it is based.

CAMERON, C.J., and ROSE, J., concurred.

Order discharged, with costs.

[CHANCERY DIVISION.]

REGINA V. FEE.

Canada Temperance Act, 1878, sec. 123—Defendant compellable to answer criminal questions—Jurisdiction of Divisional Court—Practice—41 Vic. ch. 16 (D.)—Order to quash conviction made on default.

Held, that under sec. 123 of the Canada Temperance Act, 1878, a defendant is compellable, when called as a witness, to answer questions, even though tending to criminate himself.

Review of legislation on the subject of such evidence.

Where an order quashing a conviction is made upon default of anyone appearing to support it, the effect of quashing it not only involving the restoration of the fine paid by the defendant, but exposing the convicting magistrate to an action, there is inherent jurisdiction in the Court to open up such order so made.

The jurisdiction of the full Court to rehear motions to quash convictions has not been taken away by the Judicature Act, but still exists in the Divisional Courts.

Regina v. Halpin, 12 O. R. 330, not followed.

THIS was an application to the Divisional Court of the Chancery Division to open up a certain matter wherein an order had been made by the Honorable Mr. Justice Ferguson quashing a conviction under the Canada Temperance Act, 1878, and to set aside the said order; and for leave to shew cause to the application to quash the said conviction, under the circumstances mentioned in the judgment.

The matter came up for argument on February 26th, 1887, before Boyd, C., and Proudfoot, J.

T. D. Delamere, for the Crown. *Queen v. Eli*, 13 A. R. 526, decided that no appeal lay; and, therefore, Ferguson, J., was the Court of last resort. The actual order was made before we knew of it. There was a fine imposed which has been paid, and it is open now to recover the fine and sue the magistrate. This is only a quasi-criminal matter: *Rajunder Narian Rae v. Bijai Govind Sing*, 1 Moo. P. C. at p. 134; S. C. 2 Moo. Ind. App. 181; *Re Connolly*, 4 C. L. T. 301; *Regina v. Halpin*, 12 O. R. 330.

Marsh, for the defendant. If this is to be regarded as a civil proceeding there is no case to justify opening up

the order of Ferguson, J. : *McNabb v. Oppenheimer*, 11 P. R. 214 ; *Re St. Nazaire Co.*, 12 Ch. D. 88 ; *Jenking v. Jenking*, 11 A. R. 92. In a civil matter there must be a fraud or mistake to get an order opened up. The only ground of complaint here is, that another decision was not overruled. In a criminal case there is no appeal, and the effect of the order quashing the conviction was equivalent to an acquittal. As to sec. 123 of the Canada Temperance Act, we must regard the rules of common law and of ordinary evidence, and not strain this provision. I refer, also, to *Taylor on Evidence*, 8th ed., p. 1133 ; *Wharton on Criminal Evidence*, 8th ed., note to sec. 466 ; *Power v. Ellis*, 6 S. C. R. 1.

March 5th, 1887. BOYD, C.—This was a conviction under the Canada Temperance Act, 1878, whereby the defendant was adjudged to pay a fine for selling liquor unlawfully. Being brought up on certiorari before my brother Ferguson sitting in Court it was quashed (no cause being shewn, and no one appearing to support the conviction) on the ground that the defendant had been obliged to give evidence of his own criminality. After the order to quash had issued an application was made on the part of the Crown to open up the matter, on the ground that instructions had been given to shew cause, but that through inadvertence default had happened. The Judge was disposed to accede to the application (if there was jurisdiction to do so), and, with a view of having the whole matters in controversy investigated, has sent the application, and all things thereto appertaining, to be disposed of by this Divisional Court.

The Judge quashed the conviction, following the cases of *Regina v. Halpin*, 12 O. R. 330, and *Regina v. Connolly*, 4 C. L. T. 301, on which the former is based ; but is not satisfied that he should have followed those decisions if his judgment is final.

If the evidence was properly received the conviction should not have been quashed. The effect of quashing it will not only involve the restoration of the fine which the

defendant paid, but it will also expose the convicting magistrate to an action. Given such circumstances, I incline to think that there was inherent jurisdiction to open up the order made upon default, pursuant to the general principle laid down in *Rajunder Narian Rae v. Bijai Govind Sing*, 2 Moo. Ind. App. Ca, at p. 220, S. C. 1 Moo. P. C. 117, and lately recognized in *VenKata Narasimha Appa Row v. Court of Wards*, 11 App. Cas. 660. But apart from this there has been a practice established prior to the Judicature Act and subsequent to the Administration of Justice Act of 1874 (37 Vic. ch. 7), (O.), by which, under sec. 17 of that act, motions to quash a conviction were made to the Judge in single Court, from whom there was a right to resort to the full Court by way of rehearing: *Regina v. Bradshaw*, 38 U. C. R. 564, and note 569; *Regina v. Lawrence*, 43 U. C. R. 164; *Regina v. McAllan*, 45 U. C. R. 402. Arising out of this was another practice followed for convenience by which the single Judge would often enlarge the motion before the full Court: *Regina v. Black*, 43 U. C. R. 180; *Regina v. Wehlan*, 45 U. C. R. 396; *Regina v. Roddy*, 44 U. C. R. 605; *Regina v. Grainger*, 46 U. C. R. 382; *Regina v. Bennett*, 3 O. R. 45; and this practice is referred to by Galt, J., in *Regina v. Halpin*, 12 O. R. 330. The sections of the Administration of Justice Act are now in the Revised Statutes of Ontario, ch. 50, secs. 281-2.

This right of rehearing, which existed in matters of a criminal nature such as this, before the Judicature Act, is not interfered with by that Act, and it applies to the present case: *Attorney-General v. Bradlaugh*, 14 Q. B. D. 667. If there was jurisdiction to apply to a single Judge to quash this conviction, there is jurisdiction in the full Court to reconsider his decision. If the single Judge had no jurisdiction, then the whole proceeding was *coram non judice* so far as he was concerned, and the conviction remains in full force.

The way is thus cleared to deal with the question before us on the merits. My opinion is, we ought not to follow the cases cited. The decision of Galt, J., in 12 O. R., was one

rather out of comity to the decision of the Court of Prince Edward's Island (reported in 4 C. L. T. 301) than because of the independent views of the learned Judge himself. The decision in *Regina v Connolly* interprets the 123 sec. of the Canada Temperance Act, which reads "On the trial of any proceeding, matter, or question under any of the Acts in the 112th section of this Act mentioned, or under this Act, the person opposing or defending, or the wife or husband of such person opposing or defending, shall be competent and compellable to give evidence in such question, matter, or proceeding." Palmer, C. J., thinks that while it is not unlikely that the person who penned the Act supposed that this clause would be sufficient to compel the defendant or witness to answer, privilege or no privilege; yet he agrees with Hensley, J., that the enactment is of such doubtful phraseology that it ought not to be so construed as to take away the common law protection against a witness criminating himself.

Perhaps the origin of this section can be traced by means of a brief *resumé* of some legislation as to evidence. The English Statute 14 & 15 Vic. ch. 99, sec. 3, provides for the reception of the evidence of parties; but it declares that nothing contained therein shall render any person who, in any criminal proceeding is charged with the commission of an indictable offence, or of any offence punishable on summary conviction, competent or compellable to give evidence for or against himself, or shall render any person compellable to answer any question tending to criminate himself.

A change in the same direction was made in Canada by 16 Vic. ch. 19 (now C. S. U. C. ch. 32), which did away with incompetency on the ground of interest, and permitted any party to call his adversary. By sec. 18 of the C. S. U. C. the same provision appears as to criminal matters as that cited above from the English Act. By 33 Vic. ch. 13 (O.), all parties were made competent and compellable witnesses, but with the same proviso as to questions tending to criminate. By 36 Vic. ch. 10, sec. 4 (O.), it was enacted that on the trial of any proceeding, matter, or question

under any of the Acts of the Province of Ontario relating to tavern and shop licenses, &c., before any justice of the peace, &c., *not being a crime*, the party opposing or defending, or the wife or husband of such person opposing or defending, shall be competent and compellable to give evidence in such proceeding, matter, or question." These enactments were carried into R. S. O. ch. 62, secs. 4, 5, and 9.

The internal evidence is very persuasive, that in 36 Vic. ch. 10, sec. 4 (O.), we have touched the original of the section under discussion in the Canada Temperance Act, 1878, (sec. 123). *Regina v. Boddy*, 41 U. C. R. 291, is an important decision on the scope of the former section. A conviction for selling intoxicating liquor on Sunday was obtained on the evidence of the defendant, and it was quashed because, *being a crime*, it was not within 36 Vic. ch. 10, sec. 4. (O.) The Court, however, do not doubt but strongly suggest, that such an enactment is in contravention of the general policy of the law, and of the maxim *nemo tenetur seipsum accusare*. The latest case following *Regina v. Boddy*, and suggestive in the same way, is *Regina v. Lackie*, 7 O. R. 431.

Juristic writers disagree as to the policy and, indeed, the humanity of permitting the compulsory examination of persons criminally accused. With such considerations expounders of the statute law are not concerned. The Legislature has declared that those charged with selling spirituous liquors in contravention of the Temperance Act are competent and compellable witnesses. The sole question is as to the scope of that provision. These are well understood terms: "competent" applying to the case of a person offering himself as a witness on his own behalf, and "compellable" applying to his enforced testimony at the instance of the other side. The clause is not to be so construed as to avoid its obvious, reasonable meaning, or so as to neutralize its natural operation. This, however, appears to be the effect of the *Island* decision, which practically works a judicial repeal of this part of the Act. The section

is by that Court so read as to mean that the defendant charged with selling liquor illegally is a competent and compellable witness, provided that he be not asked or required to answer anything to prove him guilty of the charge. To what end then is he a witness? For what purpose is he sworn to tell the *whole* truth? Because any question which is relevant to the matter in hand is but a step towards the proof of his guilt, and from answering such a question he can shield himself. Lord Eldon states correctly the extent of this privilege in *Paxton v. Douglas*, 19 Ves. 225, where he says that it extends not only to the question direct, but also to every question tending to form a link in a chain of proof that is to affect him. See also *Fisher v. Ronalds*, 12 C. B. 762. The plain and inevitable result is that this maxim "*Nemo tenetur*," &c., cannot be set up against the statute. It is superseded in the investigation of these minor offences, because the Legislature have deemed that course more desirable than to continue to this class of accused persons their former privilege of being exempt from compulsory examination.

Such a construction does not isolate this enactment as a legislative solecism. Blackstone long ago referred to the statute 2-3 Ph. & M. ch. 10, which was the first warrant given for the examination of a felon, and observes that by the common law his fault was not to be wrung out of himself, but rather to be discovered by other means and by other men: iv. 296. This statute was repealed by 7 Geo. IV. ch. 64, and other similar provisions for the examination of the prisoner introduced, which was in force till 1846, when it was repealed by 11-12 Vic. ch. 42.

In like manner as stated by Shee, J., in *Regina v. Robinson*, L. R. 1 C. C. R. at p. 90, the maxim that no man shall be compelled to criminate himself was, in the case of the examination of bankrupts and others in bankruptcy, annulled by the Bankrupt Acts. A case very analogous to the present is upon the construction of the Bankrupt Law Consolidation Act, 12-13 Vic. ch. 106, sec. 117, which provides that it shall be lawful to examine the bankrupt

touching all matters relating to his trade dealings or estate, or which may tend to disclose any secret grant, conveyance &c. It was held in *Regina v. Scott*, 1 Dears. & B. C. C. 47, that he was bound to answer all questions although his answers might criminate himself; and that such answers might afterwards be given in evidence against him upon a criminal charge. The Judges refused to imply a proviso that information so obtained should not be used against the bankrupt.

Lord Campbell, C.J., in giving judgment, said at p. 57: "The questions, although tending to criminate the bankrupt, are made lawful, and if he refuses to answer them he is liable to be committed and imprisoned, as upon a refusal to answer any other lawful question. * * The next objection is, that the examination was compulsory. * * Such an objection cannot apply to a lawful examination in the course of a judicial proceeding. * * Finally, the defendant's counsel relies upon the great maxim of English law, '*Nemo tenetur seipsum accusare*;' but Parliament may take away this privilege and enact that a party may be bound to accuse himself; that is, that he must answer questions by answering which he may be criminated. * * The maxim of the common law has, therefore, been overruled by the Legislature. * * When the Legislature compels parties to give evidence accusing themselves, and means to protect them from the consequences of giving such evidence, the course of legislation has been to do so by express enactment." Alderson, B., shortly said: "My judgment proceeds upon the ground that if you make a thing lawful to be done, it is lawful in all its consequences." That case was followed in *Regina v. Cross*, 1 Dears. & B. C. C. 68, and by many others, of which one of the last is *Ex parte Scholfield*, 6 Ch. D. 230.

So again, in a criminal suit against a clergyman under the Church Discipline Act, the defendant is competent and compellable to give evidence; which means that he is obliged to incriminate himself, if he is guilty and speaks truly: *Bishop of Norwich v. Pearce*, L. R. 2 Ad. & Ecc. 281.

No more pointed illustration of the value of these words, "competent and compellable," can be given than the legislation which grew out of the well known case of *Attorney-General v. Radloff*, 10 Exch. 84. That arose out of the trial of an information for the recovery of penalties for smuggling, the defendant being tendered as a witness on his own behalf. The Court was equally divided as to his competence, that depending upon whether the proceeding was or was not of a criminal nature. After five legislative attempts to remedy this uncertainty, the statute 39-40 Vic. ch. 36, sec. 259, was at length passed, by which it is provided that in cases of penalties for smuggling, "the defendant shall be competent and compellable to give evidence." See *Taylor on Evidence*, 8th ed., p. 1154, and *Regina v. Garrett*, 1 Dears. C. C. 232.

The views of some eminent English Judges on this point are seen in the remarks made in *Regina v. Payne*, L. R. 1 C. C. R. at p. 352, where Blackburn, J., observed: "If a prisoner on his trial is examined he must be cross-examined; and that can hardly be without his giving evidence against himself;" and Brett, J., puts it interrogatively thus at p. 355: "Is not the true ground, and the broad one, that no one on his trial for a criminal offence can be examined or cross-examined, because no one is bound to criminate himself?" If, therefore, the restriction is taken away, and the defendant on a criminal charge is made a witness by the statute, and is declared to be not only a competent but a compellable one, the conclusion is inevitable that he must answer questions whether they tend to criminate him or not, at the peril of being imprisoned for contumacy if he refuses.

By the Criminal Code Bill introduced by the English Government in the Commons in 1879, and which I believe is yet in abeyance, it is proposed that any one accused of an indictable offence, and the husband or wife of such person, shall be a *competent* witness for himself or herself, and may be cross-examined if he tenders his evidence. But a provision is added that no such person shall be liable to

be called by the prosecutor, thus (says the text-writer I quote from) recognizing the principle *nemo tenetur seipsum accusare*. See *Broom's Legal Maxims*, 6th ed., pp. 928-9.

The state of the law contemplated by this draft bill is precisely what has been for several years law in nearly all of the United States. The constitution of the United States establishes as a fundamental law that "No person * * shall be *compelled* in any criminal case to be a witness against himself ;" but in the several States enabling Acts have been passed by which the accused may be a *competent* witness in his own behalf. In these States, when once the accused has assumed the position of a witness he is treated as having waived his privilege, and is not exempt from answering any questions, though it may involve self-crimination : *Commonwealth v. Lannan*, 13 Allen 563 ; *Commonwealth v. Mullen*, 97 Mass. 545 ; *State v. Fay*, 43 Iowa 651 ; *State v. Ober*, 52 N. H. 459.

It appears evident that the old law resting on an extension of the maxim "*Nemo tenetur seipsum prodere*," is seriously invaded even by the provision that the accused is a *competent* witness. If he does tender himself all the truth must out on cross-examination ; if he does not do so and there is any evidence against him, the necessary presumption will be that he is not able to contradict the testimony, and his silence becomes the strongest suggestion of his guilt. There seems little reason to doubt that the disciples of Bentham will prevail in this direction as they have done in so many other departments of English law. Sir H. Maine remarks : " I do not know a single law reform effected since Bentham's day which cannot be traced to his influence : " *Early History of Institutions*, 397.

Bentham's reflections on this maxim may be too sweeping, but are not without serious import, when he says : " If all the criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first they would have established for their security ? Innocence never takes advantage of it—innocence claims the right of speaking, as guilt invokes the privilege of silence." *Treatise*

on Judicial Evidence, p. 241.* Following in his wake, Fitzjames Stephen, before he was raised to the bench, wrote in the Juridical Society Papers, Vol. i. p. 469, that this peculiarity of the law rests on no express enactment, on no broad principle, and only on a comparatively modern tradition: "The principle has been repeatedly disregarded both by our greatest Judges (he refers to Holt, L.C.J., Hyde, C. J., and Bridgeman, C.J.) and by most important Acts of Parliament, and its policy may well be discussed without laying open those who question it to the charge of disrespect for the law of England."

The order quashing the conviction should be reversed; but in the special circumstances of this case, I think no costs should be given against the respondent.

PROUDFOOT, J., concurred.

* A treatise on Judicial Evidence, extracted from the manuscripts of Jeremy Bentham, Esq., by M. Dumont.—REF.

[QUEEN'S BENCH DIVISION.]

HAISLEY V. SOMERS.

Tax sale—Cash sale—Advertisement of sale—Disadvantageous sale—Notice to owner—Compensation for improvements—R. S. O. ch. 180, secs. 100, 150, 155, 159—R. S. O. ch. 95, s. 4.

At a sale of part of a certain lot for taxes the treasurer, who made the sale, marked in the sale book the part sold as the south one-tenth, but afterwards gave a certificate for the north one-tenth, and this was finally conveyed to the defendant on December 5, 1884; the bid was for one-tenth of an acre only.

Held, that the above state of facts did not invalidate the tax sale and the title of the defendant to the north one-tenth.

Held, also, that neither did the fact that the purchase money was not for a week or two after the sale invalidate it.

It appeared that in the advertisement of the sale it was not stated whether the land was patented or unpatented.

Held, that R. S. O. ch. 180, secs. 150, 155 did not cure this defect.

Again, the part sold, the north one-tenth, was not the least disadvantageous to the owner, the southern boundary of it running through a house which was on the lot, leaving about four feet on the unsold portion.

Held, that on this ground the sale could not be sustained.

Again, though the owner of the land was known, he was not notified as required by R. S. O. ch. 180, sec. 109, of the assessment and liability to sell.

Held, that this was also an omission which was not cured by R. S. O. ch. 180, sec. 155.

Held, also, that the defendant was not entitled under R. S. O. ch. 95, sec. 4, though not under R. S. O. ch. 180, sec. 159, to compensation for improvements to the land under mistake of title, and also to be paid the amount paid for taxes, interest and expenses.

THIS was an action brought by Thomas Haisley to recover possession of certain lands and mesne profits. The defendants were Sarah Somers, James Leigh, and Elizabeth Leigh.

In his statement of claim the plaintiff set out that he was the owner and entitled to the possession of lot 4 on the west side of Sandford street, in Barrie: that Sarah Somers, wife of one Joseph Somers, wrongfully assuming to be the owner thereof, had, without the plaintiff's consent, leased the lands to James Leigh and Elizabeth Leigh, who were in possession and refused to vacate the same: that the

defendants had notified him that they limited their defence to the north one-tenth of an acre of the lot.

By their joint statement of defence the defendants stated that they were in possession of the said north one-tenth of an acre: that Sarah Somers had been in possession since 1882, and had ever since paid the taxes and had made extensive improvements under the *bond fide* belief that she was the real owner of the land, and claimed a lien for the value thereof on the said property, in the event of her being held not to be the owner.

The facts of the case are set out in the judgment.

The case was tried at the last Chancery Sittings in Barrie, by Proudfoot, J., without a jury.

McCullough, for the plaintiff.

Hewson, contra.

March 10, 1887. PROUDFOOT, J.—Ejectment for town lot 4 on the west side of Sandford street in the town of Barrie. The plaintiff claimed title to the lot in question under a mortgage made on March 23rd, 1871, and a deed made in execution of a power of sale therein, made December 16th, 1875, to John Elliot, who went into possession and received the rents of the lot. John Elliott mortgaged the lot on December 20th, 1875, to Francis Muttlebury, who on August 26th, 1884, assigned it to the plaintiff. The plaintiff on September 22nd, 1885, gave notice of his intention to exercise the power of sale contained in that mortgage; and on November 28th, 1885, the writ in this action was issued. There had been default made in the payments secured by the mortgage.

The defendants objected that they being in possession of part of the lot when the writ issued they must be presumed to be the owners of that part, and that it was necessary for the plaintiff to prove title from the Crown. I overruled the objection, as the plaintiff claimed title through a person who had been in possession before the plaintiff,

and if a presumption was to prevail the plaintiff had the better right.

The real defence of the defendant Somers is, that he is a purchaser of part of lot four at a sale for taxes, and the validity of that sale is the question at issue.

The lot is a corner lot having sixty-six feet front on Sandford street, and 165 feet front on Victoria street.

The sale was for the taxes due for the years 1878 to 1882, both inclusive, and which with expenses amounted to \$40.75. In 1878 the lot was assessed to John Elliot as freeholder; in 1879 to John Elliot as owner, and George White as tenant; in 1880 to John Elliot as owner, and George White as tenant or occupant; in 1881 it was assessed to Elliott as owner, and James Cunningham as tenant; in 1882 it was assessed as non-resident. In the spring of 1883 the assessor was furnished with a list of lands liable to sale for taxes, in which the lot in question was included. The list was returned signed by the assessors and verified as required by the statute. The mayor afterwards issued his warrant for sale. The sale was advertised in the *Gazette* and a local paper, and notice was posted also as required by the statute. The lands were exposed to sale on December 3rd, 1883, when the defendant (through her agent, her husband), became the purchaser of one-tenth of an acre of lot four. In the sale book the treasurer who made the sale marked the part sold as the south one-tenth, but afterwards, ascertaining that the south one-tenth was the corner of Sandford and Victoria streets, gave a certificate for the north one-tenth, and this was what was finally conveyed to the defendant by deed dated December 5th, 1884.

The north one-tenth of an acre has a frontage of 26 feet 4 in. on Sandford street, and the southern boundary of it runs through a house that is on the lot, leaving about four feet of it on the unsold portion. The treasurer did not know that there was a house on the lot before the sale. He has never seen the house.

In 1878, John Elliot, who resided in Markham, was notified of the taxes by the collector, but no notice was sent

to him in 1879, 1880, or 1881, and no inquiry seems to have been made as to his residence or post-office address.

The advertisement in the Gazette and the local paper did not specify whether the lands were patented or not.

It would have been the least damage to the owner to have sold the west one-tenth of an acre, which would not have taken any part of the house.

The defendant Somers has spent some money and labor upon repairs to the house, and has received some rent from it.

The house at the time of the sale was in a dilapidated condition but was of about half the value at which lot and house were assessed in 1882.

It was objected to the validity of the tax sale that it was the south one-tenth that was sold, while the north one-tenth was conveyed. But the bid was for one-tenth of an acre only, and the memorandum in the sale book was a private memorandum by the treasurer. The certificate given was for the north one-tenth. I think this objection cannot prevail.

It was also objected that Joseph Somers, the husband of the said defendant, was the purchaser, and was so entered in the sale-book, and that no assignment to his wife was produced. But Joseph Somers was the agent of his wife in the matter, and the treasurer knew he was bidding for her, and the husband swears he was acting as her agent in the transaction, nor should this objection prevail.

It seems that the purchase money was not paid for a week or two after the sale, and it is said that the sale must be for cash. I think it was a cash sale, and if the treasurer was satisfied to let the payment stand over for a short time it did not make it the less a cash sale.

The three following objections deserve further consideration, viz., 1, That the advertisement did not state that the lands were patented, or unpatented; 2, That the north one-tenth was not the least disadvantageous to the owners; and 3, That notice was not sent to the owner.

Under R. S. O. c. 180, ss. 131, 185, a list is to be pre-

pared of the lands liable to be sold for taxes, among other things distinguishing the lands as patented or unpatented, or under lease or occupation from the Crown, and such list is to be published, &c. In *Hall v. Hill*, 2 E. & A. 569, it was held that the provisions of the statute, C. S. U. C. c. 55, ss. 124 and 125, requiring the county treasurer in the warrant issued by him for the sale of lands in arrear for taxes, to distinguish those that have been patented from those under lease or license of occupation is compulsory; and that sales effected under a warrant omitting such particulars are void. And in *McAdie v. Corby*, 30 U. C. R. 349, Wilson, J., says: "It would be difficult after that decision to hold that the warrant which did not so distinguish the lands was void (a), and that the advertisement, which was also in disregard of the statute in this respect, was not void." It is said, however, that the R. S. O. c. 180, s. 155, cures any defect in this respect. That section provides that if any tax in respect of any lands sold in pursuance of that Act, has been due for the the third or more years preceding the sale, and the same is not redeemed, the sale shall be final and binding. If sold under that Act, it must be after advertisements have been properly published under the 131st section. This is not an idle formality. Purchasers at such sales would be at liberty to assume that they were not bidding for a freehold, but for a lesser interest, and regulate their bidding accordingly. If it had been stated that the lot in this instance was patented, as it was admitted to be, the purchaser might have taken less than one-tenth of an acre for the \$40. The 150th sec. says that no deed for the land sold shall be invalid for any error or miscalculation in the amount of taxes in arrear, or any error in describing the land as patented or unpatented, or held under a license of occupation. This I suppose refers to the description of the land in the advertisement, for it does not seem that any statement in this respect is required in the form of the

(a) This is correctly quoted; should it not be, *not* void?

deed in Schedule K. But it recognizes the necessity for a description of some kind, and does not contemplate the case where there is an entire omission of such description. I was not referred to any case where this question had arisen since the R. S. O. ch. 180, but the remarks of Richards, C. J., in *Hall v. Hill*, *supra*, seem apposite. He says, "The Courts in this country have always held that the imposition of taxes on wild (any) land, and the selling these lands for the arrears of such taxes, with the additions and accumulations to the amount of taxes which these Acts require, in effect works a forfeiture of the property of the owner of the lands"; and he quotes the judgment of Turner, L. J., in *Hughes v. Chester and Holyhead R. W. Co.*, 7 L. T. N. S. 203, in relation to statutes of this class: "This is an Act which interferes with private rights and private interests, and ought therefore according to all the decisions on the subject, to receive a strict construction so far as these rights and interests are concerned. This is so clearly the doctrine of the Court, that it is unnecessary to refer to cases upon the point: they might be cited almost without end." I have therefore come to the conclusion, with some hesitation, that the omission in the advertisement is not cured by the R. S. O. ch. 180, secs. 150, 155.

The R. S. O. sec. 137 provides that the treasurer is to sell in preference such part as he may consider best for the owner to sell first. The subject seems to have been discussed in argument in *Street v. Fogal*, 32 U. C. R. 119, but it was not noticed in the judgment, which turned upon another point. This section certainly imposes a duty upon the treasurer to make himself acquainted with the property he was selling. He must know enough about it to know what would be best for the owners; he is not to sell at haphazard. As was said by VanKoughnet, C., in *Hall v. Hill*, *supra*, "We cannot throw aside every provision of the statute, and permit men's properties to be sold after any fashion which the officers charged with the duties of enforcing payment of taxes may choose to devise." What

is sufficient performance of the duty will vary according to the property, and its situation. If in a remote situation, or wild land, a very little attention may be all that is required: but when it was a town lot, within a few minutes walk of the treasurer's office, it was certainly incumbent on him to know whether there was a house on the property or not. Suppose it had been a valuable residence, could it be tolerated that a portion should be sold taking in half the house, when it could have been allotted otherwise. Here the treasurer made no inquiry, and did not even know there was a house on the lot. Upon this ground I think the sale cannot be sustained.

The R. S.O. c. 180, sec. 109, provides that the assessors are to ascertain if any of the lots or parcels of land contained in the list of lands liable to be sold are occupied, or are incorrectly described, and to notify such occupants and also the owners thereof, if known, whether resident within the municipality or not, upon their respective assessment notices, that the land is liable to be sold for arrears of taxes. The owner was known and he was supposed to reside (as was the fact) in Markham, but he was only notified in 1878; and as he did not acknowledge the receipt of it no further notice was sent to him and no inquiry was made as to his proper post office address. The lot was occupied at this time and was assessed to tenants for some years: the owner might well suppose the taxes were being paid by the tenants. In *Allan v. Fisher*, 13 C. P. 63, it was held that the neglect to notify the owner of the assessment and liability to sell, under C. S. U. C. ch. 55, secs. 48, 58, and 95, depriving him of the knowledge of the valuation of his property, and of an opportunity if he thinks it overcharged, and of his right to be called upon in order to have a demand made for payment invalidated the sale. I do not think an omission of this notice is cured by the healing clause of the R. S.O. c. 180, sec. 155. If it were, the statute should receive a new title being an Act to deprive men of their property without compensation, or more shortly "The Robbery Act."

The defendant Somers asks if the deed is set aside that she should be paid for her improvements. They are not of much

value, about \$30 for materials, and about the same sum is claimed for labor. The R. S. O. c. 180, sec. 159, gives a right to compensation for improvements where the sale is invalid by reason of uncertain or insufficient designation or description of the lands sold.

In the *Edinburgh Life Assurance Co. v. Ferguson*, 32 U. C.R. 253, it was held that the plaintiff was not bound to pay for improvements when the sale was not void by reason of uncertain or insufficient description of the lands sold. As the sale here is not void for that reason this statute does not apply. But there is another statute which was not in existence when that case was decided, R. S. O. ch. 95, sec. 4, and which gives a right to a person for lasting improvements made under mistake of title in the belief that the land is his own, and seems wide enough to cover such a case as the present. The improvements consisted in repairs to the house, part of which were expended on the part of the house on the unsold part, and which the said defendant could not have believed to be hers, and the said defendant has received rent for the house. It did not appear what rent had been received, nor what proportion of repairs had been expended on the plaintiff's part of the house, but, as the amount claimed for improvements is small, and the rent received has probably equalled them, it is not desirable to incur the cost of an inquiry. But if the defendant Somers desires it she is entitled to have a reference to ascertain the amount. The said defendant is also entitled to be paid the amount paid for taxes, interest, and expenses : *McKay v. Ferguson*, 26 Gr. 236. The amount of these taxes has been proved, viz, the amount paid for the purchase \$40.75, and the taxes for the subsequent years 1884, 1885, 1886, about \$5.76 each year = \$17.28, in all \$58.03.

There will be judgment for the plaintiff, with costs, he paying to the said defendant \$58.03, with interest from the dates of the several payments composing that sum, and the said defendant, if she desires, may have an inquiry upon the subject of improvements, the costs of the inquiry to abide the event.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA V. BEARD.

Canada Temperance Act—Evidence—Jurisdiction—Conviction quashed.

There being no evidence that any beverage of an intoxicating character had been sold, and therefore no evidence to support a conviction under the Canada Temperance Act, 1878, for selling intoxicating liquors, *Held*, that the magistrates had no jurisdiction, and the conviction was therefore quashed, and, under the circumstances shewn, with costs against the prosecutor.

Aylesworth obtained an order *nisi* to quash a conviction under the Canada Temperance Act, 1878, for selling intoxicating liquor without a license, on the following grounds: That the convicting magistrates in making the said conviction acted in excess of their jurisdiction and without jurisdiction, in that no offence whatever against the provisions of the said Act was shewn to have been committed by the defendant, or by any person, in that no liquor of a spirituous or other intoxicating character, nor any mixed liquor capable of being used as a beverage, was sold, bartered, or given by the defendant, or by any person, to the witnesses who gave evidence on the said prosecution before the magistrates, or to any other person.

The information was laid, 25th October, 1886, by Angus McKay, of the town of Orillia, license inspector for the license district of East Simcoe, before George J. Booth and J. B. Armstrong, justices of the peace, that he was informed and believed that "John Beard, of the township of Oro, &c., did, within thirty days previous to 25th October, 1886, at the said township, unlawfully sell intoxicating liquor, contrary to the provisions of the Canada Temperance Act 1878, and amendments thereto, which is now in force in the said County of Simcoe."

On the same day the said inspector also laid an information before the said George J. Booth, J. P.,—that "he hath just and reasonable cause to suspect, and doth

suspect, that intoxicating liquor, in respect to which an offence against the second part of the Canada Temperance Act, 1878, hath been committed, is concealed on the premises of one John Beard, junior," &c.—and prayed that a search warrant might be granted, &c.

The Canada Temperance Act, 1878, was in force in the County of Simcoe at that time. Nothing appeared to have been done on the information secondly above referred to, at least there was no note of any search warrant having been issued, or any search having been made.

On the 2nd day of November the defendant was convicted "for that the said John Beard, on 10th October, A.D. 1886, at" &c., "being a place wherein the second part of the Canada Temperance Act of 1878, then was and now is in force, *unlawfully did sell intoxicating liquor, contrary* to the Canada Temperance Act, 1878, Angus McKay being the informant. And we adjudge the said John Beard for his said offence to forfeit and pay the sum of \$50, to be paid and applied," &c.

The following was the evidence material to the point, and on which defendant was convicted :

Walter Tudhope : "I might have been at Mr. Beard's 4 weeks ago last Sunday. There were present Hugh McArthur, John Thornton, Mark McConnell and George Tudhope. I had something to drink there. I had 'cronk.' I did not get it at Mr. Beard's house : I got it in the woodshed. I did not have anything else to drink besides 'cronk.' I have sometimes drunk this 'cronk' before the Scott Act came in force, on odd occasions. I did not indulge in beer in the county of York. I asked for 'cronk' and got it. It is something that is sold since the Scott Act came in force. I had more than one glass of 'cronk' there that day. * * I cannot say what the others had, or that they had anything. * * I did not pay for any drinks. John Beard served us with the 'cronk.' There was an apology for a counter fixed in the woodshed. There were no shelves there. The 'cronk' was kind of a yellow-

ish colour. * * I expect Mr. Beard either got paid or the promise of it for the 'cronk' I got. I do not expect to pay for what I got."

Cross-examined. "I could not pledge my oath that 'cronk' is or is not intoxicating."

Mark McConnell: "I was at his (Beard's) place either three or four weeks ago on Sunday last * * I had some 'cronk' to drink there. I cannot tell what 'cronk' is. I have drunk a lot of it since the Scott Act came in force, but more before. I cannot say that the 'cronk' tasted like beer which I had drunk before the Scott Act came in force. I do not think that 'cronk' tastes like hop beer. Had two or three drinks of 'cronk' that evening I called for a treat. I paid no money, nor do I expect to pay for any, nor have I paid for it since. Mr. Beard served all with the drink. There were present Tudhope, Thornton, and one or two more, whose names I do not know. They were none the worse of liquor. There was no loud talking or quarrelling while I was there. I suppose it would be between 8 and 9 o'clock when I left there. * * I do not know of any one else treating while I was there. No one drank with me, but I drank with others."

John Thornton: "I was at his (Beard's) house three or four weeks ago and on Sunday last. There were others there besides myself—Tudhope, McConnell. * * I had some lime-juice and ginger with a little sugar. Drank these that day. Do not think I had any 'cronk.' I asked for 'lime-juice.' I do not think that lime-juice is another name for whiskey. It did not taste like whiskey. I have drunk lime-juice without ginger. When I asked for lime juice I expected to get what I asked for. I swear it was not whiskey. All the taste I could get off it was ginger. I paid for a drink for the crowd. I do not know what the rest drank. I think I had five or six drinks of this lime-juice and ginger that evening. * * I did not see any one intoxicated while I was there. I do not think there was anything intoxicating in the lime-juice I drank. I would not say whether or not there was spirits in it."

Mr. *McKay*: "I was at Beard's once after that Sunday, I had some of this lime-juice one evening after; it had ginger in it. I never got any intoxicating liquor from Beard within the last five weeks. After taking five or six drinks I felt no effects from it. I would not pledge my oath that it was intoxicating: very little liquor used to intoxicate me. I swear that I do not know whether it is intoxicating or not. Five or six glasses of intoxicating liquor would make me drunk; it used to before the Scott Act came into force. After taking five or six glasses I felt no effects from it."

On behalf of the defendant, after the close of the evidence it was submitted that there was no sale of intoxicating liquor made out. The defendant, however, was convicted, and was fined \$50 and \$9.50 for costs, to be paid forthwith; in default to be levied by distress of defendant's goods and chattels; in default of distress, to be committed to Barrie jail for two months.

Aylesworth, for the applicants.

This being a conviction not made by a stipendiary magistrate, &c., under section 111 of the Scott Act, it is still appealable or removable by certiorari, &c.; *Regina v. Klempe*, 10 O. R. 143, 149; *Regina v. Walker*, 7 C. L. T. 143, 13 O. R. 83; *Regina v. Wallace*, 4 O. R. 127; *Regina v. Elliott*, 12 O. R. 524; *Ex parte Hackett*, 21 *New Brunswick*, 513. There must be an offence proved: *Regina v. Howarth*, 33 U. C. R. 53. There is no evidence that *intoxicating liquor* was sold on the occasion complained of. There must be affirmative evidence that "intoxicating" or "spirituous liquor," or "mixed liquor capable of being used as a beverage, and a part of which is spirituous, or otherwise intoxicating," was sold: Sec. 100 of the Act, *Regina v. Howarth*, *supra*. If this case had been tried before a jury, the Judge presiding could not have said there was sufficient evidence to warrant him in allowing it to go to the jury—and that being the case, the magistrates should have dismissed the complaint.

Delamere, contra. It is not necessary that there should be sufficient evidence to go to the jury; nor is it necessary to prove what "cronk" is. There was sufficient evidence to call upon defendant to answer. He was present, and could have gone into the witness box and stated under oath whether "cronk" was "spirituous" or not; or whether it was a "mixed liquor capable of being used as a beverage, a part of which is spirituous or otherwise intoxicating." If there was evidence to go to a jury, the Court will not interfere or review the decision of the magistrates: *Regina v. Brady*, 12 O. R. at p. 360. There was a "counter" in the shed where the beverage was sold, and under sec. 119 of the Act it is declared that where "a bar, counter, beer pumps, &c.," are found it shall be inferred that liquor was kept for sale. It is not necessary that any witness should depose directly to the precise description of the liquor sold, &c.: sec. 121. It is possible the magistrates knew that "cronk" was "intoxicating liquor."

Aylesworth, in reply. If the magistrates knew that "cronk," was "intoxicating" or "spirituous" they should have been sworn as to that fact. As to the "counter," it was a mere plank put up in the wood shed; and it is not to be inferred under sec. 119 of the Act that liquor was kept for sale, unless "spirituous, fermented, or other intoxicating liquor is also found in such shop, room, or place, &c." Here no such liquor was found.

April 12, 1887. ROBERTSON, J.—There is but one ground taken against this conviction, and that is, that there is a total want of evidence to establish the charge preferred, and in that the magistrates acted without jurisdiction.

This question of want of jurisdiction, in its relation to sec. 111 of the Act, which takes away the writ of *certiorari* in certain cases, has received much consideration, and there seems to be some difference of opinion among the learned Judges who have adjudicated thereon, as to the full scope and intent of the section; but there is a consensus of opinion upon the point which is raised in this particular

case, and that is, if it manifestly appears that there is no evidence to sustain the charge, then the right of the defendant to have "the conviction, judgment, or order" removed by *certiorari* still exists.

In my judgment it is not necessary that there should be an absence of jurisdiction *over the subject matter of the charge*; it is sufficient if, on the evidence produced, there is a total absence of proof of the offence charged. I take it if one witness gives such testimony as in words describes such acts as make out the charge, then, no matter how that may be met, it is the duty of the magistrate or magistrates presiding to weigh the conflicting testimony, and whatever conclusion is come to is not subject to review, and in that case the writ of *certiorari* has been abolished.

To my mind it would be a monstrous doctrine to hold otherwise. The liberty of the subject is involved, and all that would be necessary, in some places and before some magistrates, would be to make the charge; and evidence of a person having partaken of a glass of water, or lemonade, free from the taint of any description of spirituous or intoxicating liquor, would be sufficient on which to found a conviction, and subject the defendant to the severe penalty inflicted by this Act. In the case before me there is first the information by the License Inspector, *not that the Act has been violated to his knowledge, but that he is "informed and believes."* Then, in support of this "information and belief," the testimony of the several witnesses hereinbefore set forth is given, and it is upon that testimony that these magistrates came to the conclusion and adjudicated in solemn form that the defendant had violated the law, and visited him with the pains and penalties consequent thereupon. In aid of the great moral principle of temperance the Legislature has gone much farther in making it easy to convict for an infraction of this law than in any other case which at present is in my mind; and it appears to me when these extraordinary facilities have been placed in the hands of the guardians of public morals, to bring to justice any violator

of the principle involved, it is incumbent upon those, whose duty it is to administer justice with an even hand and jealous eye, to see that the charge preferred is proved to have been committed by the accused by *affirmative*, and not negative, testimony. In my judgment there is not a tittle of evidence in this case to warrant the conviction. More than that, it is apparent that there is a recklessness in regard to this fact displayed by the magistrates, which goes far to suggest the idea that, no matter under what circumstances a man may be charged with the infraction of this law being so charged is tantamount to a conviction. The affirmative testimony here is, that a kind of beer called "cronk," and another beverage made up of lime-juice, sugar, ginger, and water, were partaken of by the parties on the occasion in question. Not a syllable is there that either of these was *spirituuous* or *intoxicating*; on the contrary, there was evidence that they were neither. Yet it appears because "cronk" is beer, and "lime-juice" is the colour of whiskey, the magistrates *assumed* that one or both were *intoxicating* or *spirituuous*, and on this want of testimony this defendant has been convicted. In my judgment there is an utter want of jurisdiction; that is to say, no case whatever has been made out—not such an one as any Judge would submit to a jury. That being so, the conviction must be quashed, and I think with costs; and I have come to this conclusion, so far as the costs are concerned, because in this case the public prosecutor, whose duty it is not only to lay information on mere hearsay, but whose duty involves the necessity of some reasonable care and forethought being exercised, as well to see that the Act when in force is properly obeyed and submitted to; but before he takes the step which may subject the party charged to great inconvenience, and to heavy loss and expense, to see, also, that he has such testimony which will in reason lead to a conviction.

In this case there was an entire want of such testimony. The prosecutor must have had some reason for "belief" that the defendant had been guilty of "unlawfully selling

intoxicating liquor;" and if it consisted really in only selling "cronk" and "lime-juice," and that these beverages were, or one of them, is really "spirituous" or "intoxicating," surely evidence of that fact could have been brought before the magistrates; but nothing of the kind is done. These parties all swear to the contrary. The justices, however, on that question, could not have believed their testimony, and they must have taken "judicial notice" of what, in their opinion, was a fact, viz., that "cronk" or "lime-juice" was and is "intoxicating" or "spirituous."

When parties are charged with grave offences it is necessary that they should be convicted only on legal testimony, and not on the mere whim, idea, or notion of the magistrate or magistrates who may be presiding.

I therefore order that this conviction be quashed, with costs to be paid by the prosecutor.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

REGINA V. HEFFERNAN.

Canada Temperance Act, 1878, secs. 108, 109, 119—Evidence sufficient to support conviction for keeping liquor for sale—Adjournment for more than one week—32-33 Vict. ch. 31, sec. 46, (D.)—Conduct of defendant waiving his right to object.

Pending a prosecution against defendant for selling intoxicating liquor contrary to the provisions of the Canada Temperance Act, an information was laid by the prosecutor to obtain a search warrant, and upon search a barrel of beer connected with a beer pump, and all the usual appliances for sale of liquor, were found on defendant's premises. An amendment of the charge was afterwards made altering it into an information for unlawfully keeping for sale; a new information was sworn, and defendant was convicted of the latter offence.

Held, that before a search warrant can issue under sec. 108 of the Act some offence against the provisions of the Act must be shewn to have been committed, and that the information for a search warrant and the evidence in this case shewed such a previous offence to have taken place.

Held, also, that the evidence given before the police magistrate shewed a keeping for sale, without reference to the special provisions of sec. 119 of the Act.

The fact that the search warrant was executed by the informer, who was also chief constable, was held not to be a ground for quashing the conviction.

Held, also, that where an adjournment of the proceedings before the magistrate for more than one week had been made at the request of the defendant, who afterwards attended on the resumed proceedings, taking his chances of securing a dismissal of the prosecution, and urging that on the evidence it ought to be dismissed, defendant had estopped himself from objecting afterwards that such subsequent proceedings on the prosecution were on this ground illegal.

Semble, that the provisions of sec. 46 of 32-33 Vic. ch. 31, (D.), that no such adjournment shall be "for more than one week" are directory merely.

Regina v. French and Regina v. Robertson, 13 O. R. 80, distinguished and not followed.

March 4th, 1887. *Aylesworth*, obtained an order nisi upon the police magistrate at Guelph and the prosecutor, Frederick W. Randal, chief constable, to quash a conviction, dated 29th November, 1886, by which the defendant was convicted on the 11th November, previously, at Guelph, for unlawfully keeping for sale intoxicating liquor in his tavern there, contrary to the second part of the Canada Temperance Act, 1878, on the following grounds:

1. In making the said conviction the Police Magistrate exceeded his jurisdiction in adjudging and ordering that twenty gallons of the intoxicating liquor, brought before him in virtue of a search warrant issued by him upon the said information for a search warrant, was forfeited to Her Majesty the Queen, and that the barrel containing the same should be forthwith broken up and destroyed, and the said twenty gallons of intoxicating liquor poured out wasted, spilled, and utterly destroyed; inasmuch as the said intoxicating liquor so brought before the said Police Magistrate was not the liquor mentioned in and covered by the said search warrant and the information therefor, and was not the intoxicating liquor in respect of which the offence against the provisions of the said statute alleged in the said information for a search warrant had been committed.

2. The said search warrant was improperly directed to and executed by the prosecutor herein, and the said intoxicating liquor was, by the said conviction, adjudged to be destroyed by the said prosecutor.

3. The said Police Magistrate had no jurisdiction to make the said conviction, or to continue the hearing of the prosecution on or after 22nd November, 1886, inasmuch as upon 13th November, 1886, after the taking of the evidence upon which the said conviction was made, the hearing of the said prosecution was by the said Police Magistrate adjourned to 22nd November following, such adjournment being for a period longer than one week.

4. The conviction proceeded wholly upon the presumption of keeping liquor for sale supposed to be raised under section 119 of the Canada Temperance Act 1878; but the presumption mentioned in the said section arose only where the appliances for the sale of spirituous liquor, together with such liquor, were found in municipalities in which a prohibitory by-law passed under the provisions of the said The Canada Temperance Act, 1878, was in force, and no such by-law was shewn to be, or was in fact, in

force in the, municipality in which this defendant's premises were situate.

5. The presumption mentioned in section 119 of the Canada Temperance Act, 1878, was only the keeping for sale contrary to the provisions of the Temperance Act, 1864.

The information was laid by the chief constable aforesaid on 10th Nov., 1886.

On 11th November, 1887, the chief constable laid another information before the said police magistrate, in which he "saith that he has just and reasonable cause to suspect, and doth suspect, that intoxicating liquor, in respect to which an offence against the 2nd part of the Canada Temperance Act, 1878, hath been committed, is concealed in the dwelling house and tavern of D. H. of the said county of G., tavern keeper, situate, &c., * * ; and informant says, that his causes of suspicion are these, that he has been credibly informed by one Dennis Flaherty, of, &c., and verily believes that the said D. F. did, on the 10th day of November, inst., purchase from the said D. H., personally, at his said dwelling house and tavern, two glasses of intoxicating liquor, to wit., strong beer, and that the said D. F. then paid the said D. H. ten cents for the said two glasses of strong beer: that the said F. then and there drank one of the said glasses of beer, and that one A. H., who was with him, drank the other; and that the said D. H. drew the said two glasses of beer from and out of a beer pump in the counter in the bar-room in the said D. H.'s said dwelling house and tavern; and informant further says, that the said D. H. was, on the said 10th day of November, inst., charged before the said undersigned police magistrate, in &c., * * for that he, the said D. H., within the space of three months (setting out the charge laid in the information on 10th November); and that a prosecution for the said offences has been brought against the said D. H. and is now pending, &c.; wherefore, the said informant prays that a search warrant may be granted to him to search," &c.

On the 13th November the defendant appeared before the police magistrate to answer the charge, when Dennis Flaherty, John Dooley, and Frederick W. Randall (the chief constable aforesaid), were examined; Dennis Flaherty, in support of the charge, as laid, for unlawfully selling, &c., and the others that under the search warrant they had found intoxicating liquor, a barrel of beer, on the premises, also a beer pump and other appliances usually kept in a bar where intoxicating or spirituous liquors are kept for sale.

The Canada Gazette of 11th April, 1885, was put in, containing the proclamation that the 2nd part of the Canada Temperance Act, 1878, was in force, &c.

This closed the prosecution, when counsel for the prosecutor asked to have the information laid on the 10th inst., charging the sale, &c., altered under sec. 116 of the Act, to meet the evidence of "keeping liquor for sale." This amendment was allowed, and the information was altered and amended, and the offence charged of "*unlawfully keeping for sale intoxicating liquor*," &c., was substituted, whereupon the defendant by his counsel requested an adjournment until 22nd Nov. On 22nd of Nov., "owing to a death in the family of defendant, the hearing of the case is further adjourned by consent of counsel on both sides, to Monday, 29th Nov., 1886, at 10 a. m." On 29th Nov. the hearing of the case was resumed, when all parties appeared. No evidence was tendered on the part of the prosecution, the prosecutor resting his case there. Counsel for the defendant stated that he had no evidence to offer for the defence, but he contended there was not sufficient evidence to convict the defendant under the amended information; and further that section 119 of the Act did not apply, there being no by-law proved under the Act in force here. The magistrate, however, did convict the defendant of the offence charged in the information as amended, i. e. for unlawfully keeping for sale intoxicating liquor, being his first offence, and he fined him \$50 and costs \$2.85, and also adjudged and ordered, in addition to the

penalty aforesaid, that twenty gallons of the intoxicating liquor, in respect of which the said offence was committed, and which had been brought before him in virtue of the said warrant, should be and the same were declared to be forfeited, &c., and that the barrel containing the same should be forthwith broken up, &c., and the said twenty gallons forthwith poured out, wasted, spilled, &c., by the said peace officer, the said William F. Randall.

The further facts and cases cited appear in the judgment.

Aylesworth, supported the order *nisi*.

Delamere, contra.

April 26, 1887. ROBERTSON, J.—As to the first objection, section 108 of the Act declares: "In case a credible witness proves upon oath before the police or sitting magistrate, &c., * * before whom any *prosecution* for an offence against the provisions of the second part of this Act is brought, that there is reasonable cause to suspect that any intoxicating liquor, *in respect to which such offence has been committed*, is in any dwelling house, * * such police or sitting magistrate, &c., may grant a warrant to search such dwelling-house, &c., for such intoxicating liquor; and if the same, or any part thereof, be there found, to bring the same before him," &c. Then section 109 of the Act directs that, "When any person is convicted of any offence against the provisions of the second part of this Act, the police or sitting magistrate, &c., before whom such person is convicted, may adjudge and order, in addition to any other penalty or punishment, that the intoxicating liquor, *in respect to which the offence was committed*, and which has been brought before him in virtue of a search warrant as aforesaid, * * or not more than twenty gallons thereof, if there be more of it than twenty gallons, be forfeited, and that any and all kegs, &c., and other receptacles of any kind whatever, found containing the same, or not more than twenty gallons thereof, if there be more of it than twenty gallons,

be broken up and utterly destroyed, and the said intoxicating liquor, or not more than twenty gallons thereof, * * poured out, spilled, wasted, and utterly destroyed." The 108 section therefore only authorizes a search warrant to issue when it is proven on the oath of a credible witness before the magistrate, "*before whom any prosecution for an offence against the provisions of the second part of this Act is brought*, that there is reasonable cause to suspect, &c., that any intoxicating liquor, in respect to which *such offence has been committed.*"

In my judgment the "offence against the provisions of the second part of this Act" must have been "committed"—not that the party has been charged with having committed the offence; in other words, there must be a *conviction* of an offence under the second part of the Act before the magistrate can *adjudge and order, in addition to any other penalty or punishment*, that the intoxicating liquor in respect to which the offence was committed, &c., shall be destroyed."

As before stated, the defendant was charged, on information in writing under oath, on the 10th November, 1886, with having unlawfully sold intoxicating liquor, &c., "*within the space of three months last past.*" *There was therefore a "prosecution for an offence against the second part of this Act * * brought."* On the following day, after this *prosecution was brought*, but before it had been finally disposed of, a credible witness proved upon oath before the same police magistrate, before whom such prosecution had been brought, "that there is reasonable cause to suspect that intoxicating liquors, in respect to which an offence against the second part of the Canada Temperance Act, 1878, hath been committed, is concealed in the dwelling house and tavern of D. H.," &c.; and that his, the informant's, causes of suspicion were that he had been credibly informed by one Dennis Flaherty, &c., setting out in detail the reasons, &c.; and, further, that the said D. H. was, on the 10th day of November, inst., charged before the said police magistrate, &c., for that he, the said D. H., within

the space of three months, &c., unlawfully did sell intoxicating liquor, &c. ; and that a prosecution had been brought and was then pending before the said police magistrate, &c., and prayed that a search-warrant might issue, &c. The search-warrant was issued on the same day, and search was made on the defendant's premises, tavern, &c., and there were found a barrel of beer in the cellar, connected with a beer-pump—which was in the bar on the counter—by a pipe. Beer was drawn from the barrel by means of the pump. It was strong beer. The bar was filled up with bottles and decanters, glasses, &c.; in fact, all the appliances usually found in a bar-room where spirituous liquors are kept for sale. These things were so found on the 11th, and on the 13th the case came on for trial before the police magistrate. The defendant was present with his counsel; the prosecutor appeared with his counsel; evidence was taken; the man Flaherty was sworn and stated that he was in defendant's tavern on the 10th November; had something to drink there; he got it from the defendant; he called for two drinks, for which he paid ten cents; Adam Hudson went in with him, witness; defendant was behind the bar; he got it out of a tap at back of the bar. There were a tap and pump both; he could not tell what he got to drink; he asked for beer; he didn't get beer; he could not tell what it was; Hudson said he would have ginger ale; witness said he would have beer; he drank the liquor; it was drawn out of the same tap as the liquor which Hudson drank. * * The bar was fitted up just as any bar would look. * * Drank out of a tumbler. Hudson drank out of a tumbler. * * "I could not swear what I got. I suppose I might have told the chief constable it was beer, but I am on my oath now. I told him he might smell my breath to see if it was beer. * * I made the statement to the magistrate that I had got beer from Heffernan, two glasses, and paid ten cents for it. I said I drank one of these glasses."

Then the evidence of a constable, John Dooley, who searched the premises with the chief constable under the

warrant, as well as that of the chief constable, was taken, by which it appeared that beyond question there were all the appliances usually kept in a bar where liquor is kept for sale, and the barrel of beer was found attached to the pump, as before stated, and that upon using the pump beer was drawn from the barrel; it was strong beer, not "ginger ale."

This was the evidence.

At the close of the case it was objected, on behalf of the defendant, that there was no evidence to sustain the charge, as then laid, viz. for unlawfully selling, &c., which seemed to be the opinion of the magistrate and was apparently acquiesced in by the prosecutor, inasmuch as he then applied to have the information altered and amended under the 116th section of the Act, which was done, and then the offence of "keeping for sale," was substituted for the offence of "selling &c.," and a new information laid and sworn to, &c. The defendant then said he was not ready to proceed with his defence on that charge, and asked for an adjournment until Monday 22nd November, which was granted.

On the 22nd Nov. the magistrate noted at the foot of the depositions and after the note of the first adjournment and that he had allowed and made the alteration and amendment in the information, that, "Owing to a death in the family of defendant the hearing of this case is further adjourned, by consent of counsel on both sides, to Monday 29th Nov., 1886, at 10 a. m." On the 29th it is noted "The hearing of the case resumed by adjournment this 29th Nov. 1886. No more evidence offered on the part of prosecution. Mr. McDonald rested his case here. Mr. Watt for defendant states that he has no evidence to offer for the the defence, but contends that there is not sufficient evidence to convict the defendant under the amended information, &c., taking many objections," &c. Now this is what took place, and the police magistrate on that convicted. In my judgment the conviction, so far as the first objection is taken to it, is well founded. There was evidence brought

before the magistrate from which he could hardly come to any other conclusion than that the defendant kept at his tavern or hotel for sale spirituous or other intoxicating liquor. It is true the testimony of the man Flaherty was not satisfactory, and perhaps by itself one could hardly say that it offered sufficient proof of the offence charged; but taking his account, as unsatisfactory as it was—and one cannot resist concluding that he was not giving a fair, honest or truthful statement, but equivocated and fenced in a manner most disgraceful, all in the interest evidently of the defendant—together with the evidence of the constable Dooley and the chief constable Randall as to what they saw and found in the defendant's bar and on his premises in the cellar under the bar, in my judgment there was evidence of the charge before the magistrate, and such evidence as a Judge would submit to a jury, were the case tried before a jury, that the defendant was keeping spirituous liquors for sale. That was the offence charged on the amended information, and I do not think there is any objection to the magistrate having received the testimony of Randall and Tooley as to what they did and got under the search warrant. In my judgment that warrant was properly and legally issued. There was an offence charged against the second part of the Act, and a prosecution for that offence was brought and was then pending before the same magistrate, and before he adjudged that the liquor and barrel should be forfeited and destroyed he found the defendant guilty of the offence of keeping for sale, which was the offence charged; and I think the evidence of Randall and Dooley was properly received and was admissible against defendant, and in this respect I am borne out by the judgment of Wilson, C. J., in *Queen v. Doyle*, 12 O. R. 347, cited on the argument.

But it is objected that the liquor adjudged to be forfeited and ordered to be destroyed was not the liquor mentioned in or covered by the search warrant, in respect to which the offence charged in the first information was

committed." I do not think this objection is well founded. The first charge was for *selling*, and the search warrant was issued in respect of the liquor in respect of which such offence had been committed. But it is also an offence to keep liquor for sale, and the 116th section permits an amendment, and such an one as was in this case made, and the information, as amended, must be read as if it were the original information laid, and as if the offence stated in the information for a search warrant was for "keeping for sale," instead of "selling;" in fact, the original ceased to exist when the amended information was "substituted" for it; therefore, "the liquor mentioned and covered by said search warrant and the information therefor was the intoxicating liquor in respect to which the offence against the provisions of the said statute, alleged in the said information for search warrant, had been committed;" and it is not necessary for the magistrate, in my judgment, to invoke sec. 119 of the Act, or the presumption thereby created, as to the consequences of finding a bar, counter, beer pumps, kegs, or other appliances usually found in taverns, where spirituous liquors are kept for sale: the fact of such liquor having been kept for sale was established by the evidence of the witness, and so found by the magistrate; and this being the case, the fourth and fifth grounds of objection are disposed of.

As to the second ground, however objectionable it may be in the abstract to allow an informer to execute the process which is issued on his information, it does not strike me that the facts in this case would afford grounds for quashing the conviction. The informer here was the chief of police, and it was to him that the search warrant was directed. He is in a purely official and public capacity, and in the execution of the search warrant he had no private or pecuniary interest to serve; and I should suppose that the fact of his being the chief constable of the city would afford some guarantee that he would discharge the duty imposed upon him with decorum and in the least offensive way possible, and there appears to be no complaint as to

the manner of his executing this warrant; nor do I think this case is parallel to that of the sheriff acting when he is himself personally interested in the matter involved, to which the process of the Court refers. Sections 101 and 102 of the Act direct by whom penalties may be sued for, and whose duty it shall be to bring prosecutions for the recovery of such penalties; and the Collector of Inland Revenue for the official division in which the offence is committed is the person whose duty it is declared to be to act, provided that in so acting he is not subjected "to any undue measure of responsibility in the premises." But the section also states that such prosecutions can be brought "*by or in the name of any person.*"

No case was cited in support of the objection, and I have not met with any which would warrant me in giving effect to it.

The third objection is to the jurisdiction of the magistrate to make the conviction, &c., inasmuch as he adjourned the hearing of the case "for more than one week," as it is said, contrary to section 46 of 32 & 33 Vic. ch. 31, (D.), the Summary Convictions Act, and two cases, *Regina v. French* and *Regina v. Robertson*, 13 O. R. 80, are cited in support of this contention. I confess at first glance these cases appear to be authority in favour of defendant, but after much consideration I have come to the conclusion that they really do not support the objection, or perhaps it would be more correct to say that the cases on which they are founded do not, in my humble judgment, quite clearly support the conclusion at which my learned brother, who gave the judgment, has arrived; and, besides, the facts in these cases are not the same as those in the case under my consideration. In the first place, in *Regina v. French* and *Regina v. Robertson*, for all that appears, the defendants did not appear on the adjournment before the convicting Justices, and, as stated by the learned Judge, "there is a decided conflict of evidence as to whether the adjournment was at the request of the defendant's counsel;" and although that

point is not determined, inasmuch as he did not think it was necessary, as in his opinion that would make no difference, in which respect I regret to say I have been unable to bring my mind to agree with him; and although I admit I should speak with great delicacy after reading his judgment, and might feel that I would be quite justified in accepting these cases as conclusive, yet this being a criminal case, and the counsel on both sides having urged their undoubted rights to my individual judgment on the whole case, I feel that both the Crown and the defendant are entitled thereto, and that, unless I am satisfied in my own mind that the decision arrived at is the correct one, and according to my view of the law, I must, no matter with what diffidence I may feel I am dissenting, give the parties the benefit of it. In the case under consideration there is no doubt as to two most important facts. 1. It was the defendant on both occasions who asked for the adjournments; first, because he was not, as he alleged, prepared to meet the charges substituted for the original; and on the second occasion, because of a death having taken place in his family. 2nd. The defendant in the case appeared on the occasion of each adjournment, and when the hearing of the case was resumed on 29th, the defendant submitted himself to the judgment of the magistrate, and urged before him that the prosecution had failed, inasmuch as the evidence did not make out the case against him on the substituted or amended information, and asked for a dismissal on that as well as on other grounds. Now, that being the state of affairs on the 29th, there is abundance of authority to shew that the party, thus submitting himself to the jurisdiction of the magistrate, is estopped from afterwards urging a want of jurisdiction: it is not a conferring of jurisdiction, but an acquiescence in that which the law has already conferred, there being no doubt that the magistrate had such jurisdiction as enabled him to entertain and dispose of the case *ab initio*. It appears to me, therefore, that the cases are not by any means parallel; nor do the authorities cited in that judgment, in my opinion, support the objection taken in this case.

The head note of *Rex v. Tolley*, 3 East 467, referred to, is misleading. It does not express the gist of the decision really arrived at by the Court. The section of the statute of 5 Ann, ch. 14, under which the conviction was made, required that the *conviction should be made within three months after the offence committed*, which in that case was on the 7th September. The information was laid on the 8th September, and a summons having been issued, the defendant appeared on the 11th September, when he pleaded not guilty, and evidence was given on the part of the informer, and also on the part of defendant, when at the instance of the informer, and with the consent of the defendant, the further hearing of the matter was adjourned to a future day, to be named by the Justice. Then, on the 25th December afterwards, (more than three months after the offence charged had been committed) *the defendant was summoned again to appear* before the said justice to answer the said charge on the 27th December, *on which day the defendant not appearing*, and proof of the service of the summons being made, the justice adjudged that the defendant, *within three months next before* the said information, viz., 7th September, did commit the offence so charged, and convicted him accordingly. This conviction, on being moved up, was quashed, on the ground *that it was not made within three months after the offence committed*, the statute being imperative as to the time when conviction should take place. Now, the defendant in that case did not consent that the adjournment should be for a time, which would make it impossible for a conviction to take place within three months; in fact, the inference to be drawn from his non-appearance on the 27th December was that he objected to it. He consented, it is true, to an adjournment to "a future day, to be named by the justice," but that could not be construed to extend to a day beyond the time when by law he could be convicted: it could only extend to a day within that time.

Another case relied on is *Smith v. Brown*, 2 M. & W. 851, but, with great deference, in my opinion that case

affords no authority whatever. That was a case where the under-sheriff tried the case by consent under the Writ of Trial Act, 3 & 4, Will. 4 ch. 42; but the under-sheriff had not jurisdiction over "*the subject matter*" of the action, the statute not applying to *actions of tort*, which that was, only to *debts and pecuniary demands*. Consent therefore could not confer jurisdiction in that case, any more than consent can confer on the County Court, in Ontario, jurisdiction in an action of libel, that tribunal being incompetent to try such actions; and the same remarks apply to *Lawrence v. Wilcock*, 11 A. & E. 941, also referred to. Then, there is the case of the *Queen v. Scotton*, 5 Q. B. 493, which resembles this case in one respect at least, viz., the appearing of the defendant on a summons to answer the charge; but it was held that the want of a *preliminary charge on oath*, under 1 & 2 Wm. IV., ch. 32, sec. 41, and 6 & 7 Wm. IV., ch. 65, sec. 9, rendered the proceedings without jurisdiction, notwithstanding that the defendant was summoned and appeared to answer. But the soundness of this has been seriously questioned by the Court for Crown Cases Reserved, consisting of Lord Coleridge, C. J., Denman, J., Pollock and Huddleston, BB., Field, Lindley, Manisty, Hawkins and Lopez, JJ., (Kelly, L. C. B. dissenting), in *Queen v. Hughes*, 4 Q. B. D. 614, and in which it is pointed out that *Rex v. Scotton* "turned upon the peculiar language of 6 & 7 Wm. IV. ch. 65, sec. 9, 'provided that, before any proceedings shall be had or taken upon such information,' the charge shall be deposed to on oath," the information on oath being a *pre-requisite* affording jurisdiction. Hawkins, J., there says, "It does not become necessary therefore to consider how far that case has been affected by recent decisions;" and Manisty, J. says, "Whether that case (*Queen v. Scotton*) was rightly decided may I think admit of considerable doubt, having regard to the qualified language of the proviso at the end of sec. 9."

In *Regina v. Belton*, 11 Q. B. 379, it appeared that the defendant had applied to the justices, at an annual licens-

ing meeting, for a license to sell excisable liquors by retail. The justices on 16th March refused a license. Belton appealed to the April Sessions, and the appeal came on for trial; witnesses were examined for the appellant, and counsel heard on both sides, and the assistant Judge (the chairman) then took the votes of the justices, and stated the majority to be that the license was refused; and nothing was said about costs, nor was it said that the hearing, &c., of the appeal was or would be adjourned to another session. Afterwards, in June, Belton was served with an order, setting forth the fact of the appeal having been preferred by petition at the Quarter Sessions in April, and that the hearing, &c. of the matter of such appeal was "adjourned from time to time until this present general sessions of the Peace * * holden as aforesaid," on the 22nd May, and that the same was then dismissed with costs, &c.; and it appears that the appeal was not heard at any time, in fact, except at the Sessions in April. The section of the Act which gave the right of appeal declared that such appeal should be to the next Court of General or Quarter Sessions (holden not within 12 days,) after the cause of complaint shall have arisen; "*and the Court at such session shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs, as to the Court shall seem meet, &c.*"; * * and it was held that "*the whole power of the Court was tied up*" in this section, and that the *cause* could not be heard at one session and then heard at another. "It was in effect determined in April, and an order, made for a particular purpose reduced the following session, as regards this case, to a mere ministerial sitting": per Coleridge, J. Lord Denman, C. J., and Patteson, J., agreed, and Wightman, J., said: "I am of the same opinion, *without impugning the general doctrine as to the power of sessions to adjourn.*" The order was therefore quashed. It will be observed that the action of the Sessions in April was held to be final; not that they had not power to adjourn the Court to another day, but *the trial of the appeal to another Session*; and it was on the

authority of that case that the other two cases of, *In re McCumber and Doyle*, 26 U. C. R. 516, and *The Queen v. Murray*, 27 U. C. R. 134, were decided. It is one thing to adjourn the *hearing of a case* from one general or quarter sessions to another general or quarter sessions, and quite a different matter to adjourn the *sittings* of the sessions. There is therefore no analogy between these three cases, and the one now before me. The statute expressly declares in the matter of appeals that they *shall be tried and disposed of at the sessions to which they are appealed*, which sessions however can adjourn from day to day, or to any future day before the next general or quarter sessions; and if an appeal comes on for trial on the first day, for example, the Court can adjourn until the next day, and so on until the trial is disposed of; or, if necessary, an adjournment might be made from the day on which the trial commenced to some future day during *the then sessions*. I therefore am of opinion that the authorities relied on in *Regina v. French* and *Regina v. Robertson* do not sustain the objection taken in the case before me.

But apart from all this, I am clearly of opinion that the weight of authority is against the proposition, that the magistrate, in the case now under consideration, had no authority to convict, because of the fact that he adjourned the hearing, or further hearing of the case, at different times, which several adjournments in the aggregate were "for more than one week."

The Summary Convictions Act, 32-33 Vic., cap. 31 (D.), is one of *procedure* only. It provides the forms to be used by the Justices, who are to act in a summary way, and directs the manner in which cases are to be prosecuted before them, the manner of enforcing attendance of defendants and witnesses, the taking of information, the hearing of the matters of complaint, the awarding of costs, the issuing of warrants of distress and commitment, the granting of certificates of dismissal or conviction, the rights of appeal, &c., and in my judgment is *directory only*, and with reference to *adjournment* I think this is clearly so.

The 46th section, which is now under consideration, is as follows : " Before or during the hearing of any information or complaint, any one Justice, or the Justices present, may, in his or their discretion, adjourn the hearing of the same to a certain time and place, to be then appointed and stated in the presence and hearing of the party or parties, or of their respective attorneys or agents then present ; and in the meantime the Justice, or Justices, may suffer the defendant to go at large, or commit him * * * or may discharge the defendant upon his own recognizance, with or without sureties, at the discretion of the Justice or Justices, conditioned for his appearance at the time and place to which such hearing or further hearing is adjourned, *but no such adjournment shall be for more than one week*."

It will be observed that the word "*adjourned*" is used as well as the word "*adjournment*." It is true the words "*from time to time*" are not there, but it does not follow from that circumstance that there shall, or can be only one adjournment ; on the contrary, he can adjourn from time to time ; but it may be that each adjournment "*shall not be for more than one week,*" and this in my judgment is the meaning of the 46th section ; but even then consent and appearance would waive that.

If the contention of the defendant is correct, and, for example, an adjournment *for one week* was to a Saturday, and at that time the hearing or further hearing was proceeded with, but the case was not fully heard up to 12 o'clock on Saturday night, there could not be an adjournment over this Sabbath day until Monday ; nor from the day, on whatever day of the week that week should end, until the following day. Therefore a case which required at least two or three days to try, and such a circumstance might, and as a matter of fact often does happen, could not be disposed of at all. If the defendant's contention is the proper reading of the section, it would often happen that crime "*would go unwhipt of Justice.*"

Take for instance where, as under the Act under which this conviction is made, it is necessary to commence the

prosecution within three months from the time of the offence committed. The information is laid just one week before the time limited expires, and the party is summoned, but in the interests of justice an adjournment is absolutely necessary for "one week." That adjournment takes place, and the Court meets to proceed with the hearing and does proceed, but it is found impossible to hear all the evidence, and Saturday night at 12 o'clock is reached and another adjournment is necessary. If the contention is sound, the magistrate by that trial has *exhausted his jurisdiction*, and he cannot again adjourn, and consequently could not hear the whole case, and all further proceedings must be abandoned. Another information could not be laid, for the reason that the three months limitation had in the meantime expired.

So much for that side of the question; but let us consider it from the defendant's side, and in his interest. We will suppose that after the prosecution has been heard the defendant is not able to secure the attendance of a *necessary and material* witness in his defence, and without whose testimony he *cannot safely proceed* further with the trial, and that it is *impossible* to secure the attendance of the witness within "one week." If the contention is correct, the *right* which every man charged with an offence has to call witnesses on his behalf; *would be denied him*, or otherwise, the Justice, having "exhausted his jurisdiction," would be obliged to hold his hand, and the prosecution be dropped.

In the *Queen v. Hughes*, 4 Q. B. D. 618, already referred to, *Huddleston, B.*, at p. 633, in giving judgment, says: "The arrest of Stanley was no doubt *illegal*; there had been no information on oath to justify the warrant, and it might be that *if the objection had been taken, the magistrates might have entertained it, but they could then and there have issued their summons (warrant) for Stanley's apprehension at once on a verbal information, which would be good.*" So in this case, had the defendant taken the objection, the magistrates might have entertained it,

and at once commenced *de novo*, by issuing a new summons and proceeding thereon in due form ; but now, these proceedings having been taken after the expiration of three months after the alleged offence, sec. 106 of the Act positively bars any further action.

In *Turner v. Postmaster General*, 5 B. & S. 756, it was held that though there was no information on oath (the 62nd sec. of 24 & 25 Vic., ch. 97, the statute on which the appellant was convicted, *requiring one*), *that after appearance and no objection made* no objection to the jurisdiction of the Justices to convict summarily could be taken, and that any defect in bringing the party before the Justices was cured by appearance and the merits of the case being gone into, and that the Justices had jurisdiction.

The fact is, it was a mere irregularity in procedure which can be waived. See also *Blake v. Beech*, 1 Ex. D. 320 ; *Regina v. Shaw*, 10 Cox. C. C. 66 ; *Queen v. Smith*, L. R. 2 C. C. 110 ; *Queen v. Widdop*, L. R. 1 C. C. 3 ; *Regina v. Stone*, 1 East 639, 648.

The motion will therefore be dismissed, with costs.

Order nisi dismissed, with costs.

[CHANCERY DIVISION.]

RE GABOURIE.

CASEY V. GABOURIE.

Will—Executor—Investment—Breach of trust.

G. lent money to W. on his promissory note, and when he died held such note as a security. By his will he directed his executors to get in the moneys outstanding and invest the same in such stocks as they might deem advisable. C., the executor, who proved the will, left the loan outstanding on the note, and at a subsequent time renewed it and took a new note made by the firm of W. Bros., of which W. was a member. The reason this was done, as stated by G., was because he could get 7½ per cent interest for the estate, which was more than he could have done if he had invested in stocks. W. Bros. afterwards became insolvent and the amount of the note was lost to the estate. It was shown that the executor was advised not to invest in stocks. In taking the accounts in the Master's office, it was held that the amount of the note should not be charged against him personally; but on appeal it was

Held, that it was a very obvious case of breach of trust which could not be excused whatever might be the hardship resulting to the executor. Interest was allowed to him, however, at the increased rate from the date at which he was charged with the note, and it was directed that interest should not be charged against him at six per cent, if it was proved that he could not have invested in stocks to realize that rate.

THIS was an appeal from a report of the Master at Belleville.

The suit was brought by Patrick Casey, as executor of one Felix Gabourie deceased, for administration of the estate, and the parties interested in the estate were made defendants.

In taking the accounts in the Master's office it appeared that one of the directions in the will of the testator was that the executor should get in the assets of the estate and invest them in stocks. During the lifetime of the testator he had loaned the sum of \$4,000 to A. H. Wallbridge, and had taken his note for the amount. When he died this note was one of the assets of his estate, but the plaintiff (executor) allowed the note to remain outstanding, interest on it being paid, and took a renewal of it from Wallbridge Bros., thus getting another person liable for the amount, because he was getting 7½ per cent. interest for the benefit of the

estate which was a higher rate than could be had on stocks. Wallbridge Bros. subsequently became insolvent and the amount was lost to the estate.

The Master found that under the circumstances the plaintiff was not liable to be personally charged with the loss, and allowed him a share of the commission in lieu of costs payable in the matter.

From this finding two of the adult defendants and the infant defendants appealed, and the appeal was argued on April 4th, 1887, before Boyd, C.

Sherry and O'Brien, for the adult appellants. Whether the defendant allowed the note to remain outstanding by way of renewal or whether he got the old note paid and reinvested it in the second note makes no difference; he was guilty of a breach of trust in either event and should be charged: *McBeth v. McBeth*, 26 U. C. R. 549; *King v. Hilton*, 29 Gr. 381; *McCarter v. McCarter* 7 O. R. 249; *Vanston v. Thompson*, 10 Gr. 542.

Harcourt, for the infant appellants. The Master's judgment would cover every case of inertia on the part of an executor: *Lewin* on Trusts, 8th ed. 290; *Williams* on Executors, 8th ed. 1811-13; *Sovereign v. Sovereign*, 15 Gr. 559; *Lawson v. Crookshank*, 2 Ch. Ch. 426. When the executor consented to the note remaining outstanding he became a trustee and accountable to the *cestuis que trustent*: *Dix v. Burford*, 19 Beav. 412; *Galbraith v. Duncombe*, 28 Gr. 37; *Huggins v. Law*, 11 O. R. 565.

T. Langton, contra. The evidence shews that the executor took advice and was told that stocks were not a good investment then. He never received the \$4,000. The renewal of the note was not a receipt of the money and a reinvestment of it: *Purtridge v. Court*, 5 P. R. 412. The new note was a renewal with additional security. If this was a case of *devustavit* the right of the injured parties is barred, fifteen years having elapsed since the renewal, and more than six years since the failure of Wallbridge Bros:

Williams on Executors, 8th ed. 2062, *Harcourt v. White*, 28 Beav. 308, 309; *Thorns v. Kerr*, 2 K. & J. 54; *In Re Gale*, *Blake v. Gale*, 22 Ch. D. 820. The evidence establishes that the maker of the original note was insolvent before the testator died, and even if proceedings had been taken against him or against Wallbridge Bros. on the new note they would have been ineffectual: *Clark v. Holland*, 19 Beav. 271, 272. The executor's conduct is entitled to every consideration, the estate having been well managed: *Buxton v. Buxton*, 1 M. & Cr. 95. In any case he should not be charged with interest: *Vanston. v Thompson*, 10 Gr. 542; *Re Crowter*, *Crowter v. Hinman*, 10 O. R. 159. The commission allowed the executor should not be interfered with: *Re Honsberger*, *Honsberger v. Kratz*, 10 O. R. 527; *Inglis v. Beaty*, 2 A. R. 453.

Sherry, in reply. The investment in a note was in violation of the terms of the will, and this action is owing to the executor's default in getting in the assets.

April 6, 1887. *BOYD, C.*—The testator directs his executors to get in the moneys outstanding, and invest the same in such stocks as they may deem advisable, and out of the proceeds of dividends to pay the annuities bequeathed; and at the death of the wife he directs the investments to be converted into money and equally divided among beneficiaries named. A large part of the assets was in the shape of a promissory note for \$4,000 (not produced), which the executor thinks was made by Wallbridge Brothers, on which they paid interest, and which he left outstanding till November, 1876, when there was a settlement or arrangement of accounts between them whereby the executor paid to the Wallbridges some \$683 and took a new note for the \$4,000, payable in a year. The reasons which induced the executor so to act were, that he considered the parties perfectly solvent, and that he was getting 7½ per cent. on the note, a higher rate than could be obtained on a stock investment. This seems to be a very obvious case of a breach of trust, which cannot be excused whatever may

may be the hardship thereby resulting to the executor. He disobeys the plain directions of the will. He prefers (to use his own words) "to take the new note as a proper investment, as I got more interest than I could have got elsewhere," and so acting he must run all the risks if in the outcome the estate suffers. The duty of the executor was to collect this note. If he tried to do so and failed then he would be, of course, exonerated; but instead of that he lets the debt run on till the parties become hopelessly insolvent, and the asset is lost. By the evidence it appears that he could have collected this note before 1871 and in 1871, and even, perhaps, as late as the end of 1875. It will, however, be a convenient point of time to charge him with the \$4,000 (as upon a breach of trust) and interest at 6 per cent. beginning at the end of a year from the date of the last note (*i. e.*, 5th November, 1872).

He should of course get credit for the larger amount of interest he may have received thereafter, and he should not be charged at 6 per cent. interest if it is proved that he could not have invested in stocks to realize six per cent. The accounts will have to be taken on this footing. This change will also affect the costs. The reason for this administration was a failure of the executor to collect this \$4,000. That is a matter for which he is to blame and costs of the proceedings should be borne by him, unless some reason exists for his exculpation of which I am not aware. He will also pay the costs of this appeal.

I do not disturb the commission which has been allowed to the executor; but that should be set off against the amount with which he is now chargeable.

The Statute of Limitations has no application to this case.

There is a vague suggestion, but no proof that the beneficiaries knew of what was going on, but made no complaint. I must take it that they were ignorant of the breach of trust. They had no claim till the death of the widow, and she yet lives; they were entitled to assume in the absence of information to the contrary, that the executor was properly discharging his duties.

As quoted by Cotton, L. J., in *Re Vernon, Evans & Co.* 33 Ch. D. 410 the *cestui que trust* is entitled to trust in and place reliance upon his trustee and is not bound to enquire whether he has committed a fraud against him unless there is something to raise his suspicion. This is not a case of *devastavit*, which rests upon the improper application of assets after being received by the executor, but the liability is founded on the wilful default of the executor to get in and properly invest available assets. In this instance as in *Smith v. O'Grady*, L. R. 3 P. C. 311 it is the executor who comes to the Court that his accounts may be taken and that it may be ascertained whether he is a debtor or a creditor of the estate. He himself courts investigation and cannot invoke the aid of the Statute of Limitations to evade what he has sought. See generally as to the inapplicability of the Statute of Limitations: *Flitcroft's Case*, 21 Ch. D. 520.

G. A. R.

[CHANCERY DIVISION.]

RE MORICE AND RISBRIDGER.

Vendor and purchaser—R. S. O. ch. 109—Provision in deed—Lawful issue.

A deed made by C. G. (mother) to J. H. G. (daughter) just after the latter's marriage, contained the following provision : "It being hereby declared and agreed that it is intended by this deed to vest in the said J. H. G. life interest and estate in the said land, and at her decease the same is to go to the lawful issue of the said J. H. G., and to be held by them, their heirs and assigns in equal shares," and was executed by both grantor and grantee. No issue were in existence at the date of the deed. Subsequently J. H. G. and her children, with the exception of two, executed a mortgage in fee of the property ; of these two, one died in the lifetime of J. H. G., leaving infant children. In an application under the Vendor and Purchaser Act, R. S. O. ch. 109, on a sale by the mortgagee it was,

Held, that the real design of the grantor and J. H. G. the grantee, appearing on the face of the deed, was that only a beneficial life estate should be given to the grantee, and that the beneficial remainder in fee should go to her children ; that each child born while the grantee lived would have a vested right to a share in the property, and that such share would descend to those who died before the grantee ; and that such a title could not be forced on a purchaser.

THIS was an application under the Vendor and Purchaser Act, R. S. O. ch. 109.

James D. Morice was a mortgagee of certain lands, and was selling under the power of sale in his mortgage, to Thomas Risbrdger. The mortgage was made by one Jane H. Gardiner, her husband James C. Gardiner, and five of her children. The deed from Catherine Graham (mother of Jane H. Gardiner) through whom title was claimed, was made to Jane H. Gardiner after her marriage, and contained the following provision : "It being hereby declared and agreed that it is intended by this deed to vest in the said Jane Harriet Gardiner life interest and estate in the said land, and at her decease the same is to go to the lawful issue of the said Jane Harriet Gardiner, and to be held by them, their heirs and assigns in equal shares," and was executed by both the grantor and grantee.

On proceeding to make title to Risbrdger, the purchaser under the mortgage sale, it was discovered that a daughter, of Jane H. Gardiner, Sarah Jane, who had married one

Walker, and died leaving three infant children, and a son, Hedley, had not executed the mortgage, and the purchaser refused to accept the title without the opinion of the Court.

The matter came up in the usual way upon petition, and was argued on April 6, 1887, before Boyd, C.

D. M. McIntyre, for the purchaser. The deed may have vested the legal estate in Jane Harriet Gardiner, but the execution of it by her as grantee made it operative as a trust. It was a declaration of trust by her to hold the legal estate first, in trust for herself for life, and second for her issue on her death: *Wickham v. Hawker*, 7 M. & W. 63; *Wilson v. Gilmer*, 46 U. C. R. 545; *Monypenny v. Monypenny*, 9 H. L. C. 114.

J. MacLennan, Q.C., for the vendor. The words are repugnant. There is nothing of a testamentary character in the deed as the grant is to take effect at once. The deed vests a fee simple followed by the usual covenants. The object of the deed seems to be to vest a fee simple, but prevent alienation, and the law will not favor that. [BOYD, C.—But it may have been intended as a gift to the grantee, and to the expected issue]. A grant to "A. and his issue" is a life estate to A. and the issue jointly if the issue are in existence, but if no issue then exist they will not take. "Issue" is a word of purchase, and not of inheritance. Here there were no issue in existence at the time. The words "child" or "children" in a deed are words of purchase: *Elphinstone, Norton & Clark*, on the Interpretation of Deeds, 319; *Lario v. Walker*, 28 Gr. 216; *In re Parry and Daggs*, 31 Ch. D. 130 at 134. The provision in the end of this deed is void, as repugnant, as it follows a grant to and covenants for title and quiet enjoyment with the grantee and *her heirs*. Even if the execution by the grantee operated as a re-grant there were no issue in existence at the time, so the grantee took the fee simple. I also refer to *Sheppard's Touchstone*, 88.

McIntyre, in reply. The clause at the end of the deed amounts to a limitation of a trust estate. Jane H. Gardiner the grantee of the legal estate takes a beneficial life estate immediately, and an equitable contingent remainder is limited to her issue. The remainder falls within the fourth class of contingent remainders as classified by *Fearne*. See *Challis's Law of Property*, Am. ed. 94. Trusts are now of the same nature as uses were before the passage of the Statute of Uses, and are as flexible for the limiting of future estates as uses then were: *Challis*, 288.

April 9, 1887. BOYD, C.—Counsel for the vendor argued thus on the construction and effect of the last clause of the deed: the grantee having executed the deed, the effect may be to operate as a re-grant of the property to herself and her issue, but as no issue was then in existence, nothing can be taken by the issue, and the whole estate is still in the grantee Jane Harriet Gardiner. The authority cited for this proposition was *Elphinstone, Norton & Clark* on the Interpretation of Deeds, p. 319, which thus states the law: "A limitation of realty to A and his issue, there being no issue alive at the date of the deed, gives a life estate to A, and the issue take nothing, even if the limitation is in remainder, and issue are born before it takes effect." But that statement is to be understood as relating to cases where the issue are to take in conjunction with and not by way of remainder after the death of the parent. If the limitation is by way of life estate to the parent and remainder thereafter to the issue, that would be a good remainder, though no children were then born, if they came into existence before the remainder vested in possession: *Sheppard's Touchstone*, p. 235. The children or issue would in such a case take as they came into being, and on the birth of each the estate would during the existence of the particular estate open to admit him to his share: *Comberback v. Perryn*, 3 T. R. 484; *Mogg v. Mogg*, 1 Mer. 654; *Wheeler v. Duke*, 3 Tyr. 69; S. C., 1 Cr. & M. 210, per Bayley, B.

If the effect of the execution by the grantee is to operate as a re-grant, it would be by the terms of the last clause to herself for life, and at her decease to go to the lawful issue of her the said Jane Harriet Gardiner to be held by them, their heirs, and assigns, which is a good remainder. But if that be not the legal effect of the instrument, as it stands, the execution by grantor and grantee was plainly intended to manifest the mutual understanding and agreement upon which the conveyance was made. Judging of the transaction by what appears on the face of the deed, the real design of both was that only a beneficial life estate should be given to the daughter of the grantor (then lately married), and that the beneficial remainder in fee should go to her children.

This is an agreement for value in the nature of a settlement to which the Court of Equity would give effect by way of cutting down the fee given to the mother, or by declaring that as to the remainder after her life estate it was held in trust for the issue, or by otherwise rectifying the instrument which does not appear fully to carry out the intention of the parties.

If I am right in this view of the case, each child on being born while the grantee lived would have a vested right to a share of the property, and that share would descend to the children of those who die before the life-tenant. It thus appears to me that the infant children of Sarah Jane Walker who died in 1884, and who was of the lawful issue of the grantee Jane Harriet Gardiner (who is yet alive) have an interest in the property, and that for this reason the title is not such as can be forced upon a purchaser. See *Baldwin v. Carver*, Cowp 309.

If the parties have not arranged as to costs, they should be born by the vendor.

[COMMON PLEAS DIVISION.]

GORST V. BARR.

Slander—Privileged communication—Crime.

The plaintiff had been working for a couple of days for the defendant as a seamstress, when the defendant missed \$11, and so informed plaintiff. She drove plaintiff home that evening, stating she would require her again in a week or so. Next day defendant laid the case before the chief of police, who said plaintiff must have taken the money. The defendant then went to a Mrs. W. for whom she thought the plaintiff was working, and on being informed the plaintiff was not there, asked to see Mrs. W. alone, and said, "I have missed \$5. I went to the chief of police and laid the case before him," and he said "plaintiff had taken the money;" that plaintiff was the only one at defendant's house except defendant's children and sister. Defendant asked what she should do, and asked if she could have the plaintiff arrested. Mrs. W. advised her not to, but to go and see plaintiff. The defendant then went to a Mrs. B. for whom the plaintiff was working, and called plaintiff outside and told her what the chief had said; she then put her hand on plaintiff's shoulder and said, "You did, you must have taken it," and asked her to confess and give back the money, and defendant would give her all her sewing. The plaintiff denied taking the money, and asked to be taken to her father, and defendant drove her to her father's residence. Before doing so, Mrs. B. asked plaintiff what was the matter, and plaintiff said that defendant accused her of taking some of her money. Mrs. B. said, that through the door having blown open, she heard the defendant say "You did, you must have," and the door then slammed to. On arrival at her father's, the defendant did not want to go in, but on his pressing her, asking what was the matter between her and plaintiff, defendant informed him she had missed some money, and told him what the chief of police had said. The father asked her if she knew plaintiff's character, and why she should be accused more than defendant's sister. The defendant appeared shocked at the suggestion, and said she would have plaintiff arrested; and the father then said that she would do so on her own responsibility. In an action of slander:

Held, that the action was not maintainable; that the words spoken to the plaintiff's father were privileged, while those heard by Mrs. B. and those spoken to Mrs. W. did not impute any criminal offence.

THIS was an action of slander tried before O'Connor, J., and a jury, at Sandwich, at the Fall Assizes of 1886.

The statement of claim set out the speaking of the alleged slanderous words on three occasions, as follows:

1. On the 28th day of September, 1885, in a conversation with the plaintiff in the presence and hearing of one Mrs. Board, the defendant said to the plaintiff, "You did, you must have, there was no one else to do it," meaning

thereby that the plaintiff had feloniously stolen money from the defendant.

2. On the said 28th day of September, in a conversation then had with Mrs. Wigle, the defendant falsely spoke and published of the plaintiff: "I have missed five dollars. I went to Mr. Bains," meaning the chief of police in the town of Windsor, "and laid the case before him," meaning that the defendant had charged the plaintiff with feloniously stealing money from the defendant.

And, 3. On the said 28th of September the defendant, in a conversation she then had with Thomas Gorst, falsely and maliciously spoke and published of the plaintiff: "She," meaning the plaintiff, "must have taken the money, as nobody else could," meaning thereby that the plaintiff had feloniously stolen money from the defendant.

From the evidence it appeared that the plaintiff on Friday and Saturday, the 25th and 26th of September, 1885, had been sewing at the defendant's, who, on Saturday, went out for a time, and on her return said to the plaintiff that she had lost a ten-dollar voucher. Then she went down stairs and returned in about half an hour, and said "there is a silver dollar gone too." She then drove the plaintiff in the evening to her own home, and told her she would want her again in a week or so. On the Monday following the plaintiff was sewing at a Mrs. Board's, and defendant went there to see her. She called her outside, and told her she had been to Mr. Bains, the chief of police, and laid the case before him, and that he said "you have taken the money"—that "her seamstress had evidently taken the money." Then she went close up to the plaintiff, put her hand on the plaintiff's shoulder and said, "You did, you must have taken it." She said, "Now confess and give me back my money, and I will give you all my sewing and no one will know anything about it." The plaintiff said she would never tell a lie, and had nothing to confess; and then said to defendant she had better take her to her (plaintiff's) father. The defendant drove her to her father's. Before going the plaintiff went

up stairs for her things, and Mrs. Board asked her what was the matter. To which she replied, Mrs. Barr accused her of taking some of her money on Saturday. When they got to the plaintiff's father's the defendant did not wish to go in, but her father went to the door and asked her to go in and inquired what the trouble was between her and the plaintiff. She said that she had lost \$11—lost it while plaintiff was at her house, and that there was no one there but her sister and the plaintiff; and that plaintiff must have taken it: that she had gone to Mr. Bains, the chief of police, and laid the case before him, and he said that "her seamstress must have taken it." The plaintiff's father, said "the girl;" meaning the plaintiff and the defendant said "yes." The father said, "Do you know that girl's character? why should she be accused any more than your sister?" The plaintiff said, "My sister!" and drew herself up and seemed shocked, and said she would have Mr. Bains arrest plaintiff; and her father said, if she did she would do so on her own responsibility. Mrs. Board said she heard what defendant said: that the door blew open; and she heard defendant say to the plaintiff: "You did, you must have," and then the door slammed to. She said the defendant was talking loud and violently.

The plaintiff's father gave the following account of what took place when the defendant drove the plaintiff home in her buggy: "Jesse came in, and I asked her what was the matter. She said, Mrs. Barr had accused her of stealing some money; and I went out and invited Mrs. Barr to come into the house, but she seemed very backward in doing so, and I had to almost coax her in; and she came in, and I asked her 'what was the matter between her and Jessie,' and she said: well, 'she had missed some money, and she had been to Mr. Bains and stated the case to him, and he said 'evidently that no one else could have taken it but her seamstress,' and I said: 'Mrs Barr, your sister and children were there, weren't they. I said, 'Is that girl any more likely to take it than they are.' With that she drew herself up and said, 'her sister!'"

Mrs. Wigle gave the following account of what took place between her and the defendant: "She asked me if Miss Gorst was there. I told her she was not. She asked me if she could speak to me alone. I said there was no one there but my little children; and she told me that she had missed \$5; and I said I was very sorry; and she said that there was no one there, excepting Miss Gorst and her (defendant's) sister, and defendant's children. She said she had spoken to chief of police Bains; and he said it is very evident your seamstress has taken the money. She said she did not know what to do about it. She asked me what would I do. She said would I have her arrested; and I said no. I said I would go to Miss Gorst and speak to her about it. She asked me if I knew where she was, if there was any other Mrs. Wigle she sewed for; and I directed her to Mrs. Ernest Wigle. She said she had been directed to my place by Mrs. Gorst, the plaintiff's mother. Her mother said she did not know just where she was. She said she thought she was at Mrs. Wigle's; and she thought Miss Gorst's mother knew, at the time she told her she was working for me, she was not there."

At the close of the plaintiff's case Mr. McHugh, counsel for the defendant, moved for a nonsuit, on the ground that the communication made to the plaintiff at Mrs. Board's and to the plaintiff's father was privileged, and there was no publication to Mrs. Board. What she heard not being defamatory and not imputing a crime, if not privileged; and that the alleged slanderous words spoken to Mrs. Wigle were not capable of the construction placed upon them in the statement of claim. All that was alleged was that the defendant said she missed \$5, and went to the chief of police and laid the case before him, meaning thereby that the defendant had charged the plaintiff with feloniously stealing the money from her.

The learned Judge overruled the objections inclining to the view that the communications, other than that made to Mrs. Wigle, were privileged, but that to Mrs. Wigle was not.

The defendant was then called and swore to the loss of money, amounting to \$11, and to her belief that the plaintiff had taken it, in which belief she said she was strengthened by what the chief of police had said to her.

The jury found a verdict for the plaintiff with \$250 damages.

In Easter Sittings, November 9, 1886, *J. B. Clarke*, for the defendant, obtained an order *nisi* calling on the plaintiff to shew cause why the verdict for the plaintiff should not be set aside and a new trial had between the parties, on the ground (1) That the same was against law and evidence and the weight of evidence. (2) That the three several occasions on which the words complained of were spoken were privileged occasions—that the words were privileged communications; that the statements were made *bond fide*, and in the belief of their truth, and in the prosecution of necessary enquiries, and without any malicious motive. (3) That the words complained of having been spoken on privileged occasions, the case ought not to have been left to the jury; and the learned Judge, having held that the words spoken in the presence of Thomas Gorst were privileged, ought not to have left them to the jury. (4) That no publication was shewn of the words said to have been spoken in the presence of Mrs. Board. (5) That no damages were shewn to have been suffered by the plaintiff. (6) That the words complained of are not actionable, and were not spoken in a defamatory sense; and on grounds appearing in the evidence.

During Hilary Sittings, *Foster*, Q. C., supported the rule, and referred to *Toogood v. Spyrring*, 1 C.M. & R. 181; *Taylor v. Hawkins*, 16 Q. B. 308; *Odgers* on Libel and Slander, pp. 200, 220, 283; *Starkie* on Slander, 3rd ed., p. 525; *Folkard* on Slander and Libel, 4th ed. p. 519; *Howe v. Jones*, 79 L. T. Journal, 81; *Hargreaves v. Sinclair*, 1 O. R. 260; *Clark v. Molyneux*, 3 Q. B. D. 237; *Dewe v. Waterbury*, 6 S. C. R. 143, 158.

Delamere, contra, referred to *Derry v. Handley*, 16 L. T. N. S. 263; *Folkard* on Slander and Libel, 4th ed., p. 516.

March 12, 1887. CAMERON, C. J.—I think it clear beyond question that the words spoken to the plaintiff by the defendant at Mrs. Board's would have been privileged even if spoken in the presence and hearing of Mrs. Board.

The current of authority since the decision of the case of *Toogood v. Spyring*, by the Court of Exchequer, in 1834, reported in 1 C. M. & R. 181, has been uninterrupted in support of such privilege. But it is not necessary to go so far in this case, for the words heard by Mrs. Board in no manner, *per se*, or in the context with what she heard said, imputed a criminal offence to the plaintiff. It was only by reason of what the plaintiff herself said in reply to her question, "what is the matter"? that Mrs. Board had any intimation as to what the words meant, and I think my learned brother O'Connor was in error in supposing, because it might be difficult for the plaintiff to evade truthfully answering Mrs. Board's question, that the defendant must be held responsible for that truthful answer.

In the recent case of *Tompson v. Dashwood*, 11 Q. B. D. 43, it was held that a defamatory communication intended to be sent to one person, and so sent it would have been privileged, was not less privileged when sent by mistake and unintentionally to another person to whom the making of such communication intentionally would have been actionable.

Watkins Williams, J., in giving judgment, said, at p. 45: "The law stands thus, if a man writes and publishes of another that which is defamatory and untrue the law will imply malice on his part, and the plaintiff need furnish no evidence whatever of malice; he need only prove the defamatory and untrue character of the statements of which he complains. But there are occasions on which the law regards the defendant as so placed and having such an interest with respect to the subject matter of the libel,

that, upon principle founded upon common sense, the legal implication of malice is removed. That is the doctrine of privilege. * * It is admitted that the defendant stood in such a relation to Colonel Wood that in writing to him the legal implication of malice was technically rebutted, and the defendant, in the absence of malice in fact, was protected by privilege; but it is contended for the plaintiff that the defendant having carelessly put the letter in the wrong envelope, so that it reached the hands of a person with whom he had no such relation, the protection of privilege is destroyed and the case put into the condition in which the law implies malice. I think there is a fallacy in that contention. The defendant's state of mind was never altered. His intention was always honestly to do that which he conceived to be his duty. I can see nothing to justify the conclusion, as matter of law, that by reason of the defendant's inadvertence the case is taken out of the category of privilege, so that malice should be implied. There is no direct authority on the question, though there have been cases to the effect that mere accident or inadvertence in using language, or publishing writing, spoken or written on a privileged occasion will not supply the necessary evidence of malice in fact which will destroy the privilege."

I have made this long quotation from Mr. Justice Williams's judgment, on account of its being a clear exposition of the law indicating the necessity of establishing express malice to remove the protection where defamatory matter has been written or spoken on a privileged occasion. The chance presence of Mrs. Board could not destroy the privilege that the defendant had to make to the plaintiff the charge of taking her money, and make the charge itself sufficient evidence of express malice.

But the case of *Padmore v. Lawrence*, 11 A. & E. 380, in which the nature of the charge is like that made against the plaintiff by the defendant in this case, clearly establishes the presence of a third party does not remove the privilege.

There remains to be considered the words spoken to Mrs. Wigle. What was said to the plaintiff's father being clearly within the privilege that repels the legal presumption or implication of malice. The words spoken to Mrs. Wigle, as charged in the statement of claim, are not actionable. They are: "I have missed \$5. I went to Mr. Bains, chief of police, and laid the case before him." The plaintiff's name is not mentioned, nor is there any imputation against her contained in the words. The evidence of Mrs. Wigle also fails to make out an assertion by the defendant that the plaintiff had, as the innuendo in the statement of claim alleges, stolen money from her. Put in narrative form her evidence simply amounts to this: She did not know the defendant before she came to her house and asked if the plaintiff was there. She was told she was not; and she asked if she could speak to witness—see her alone; and being assured there was no one there but her little children, the eldest five years old, the defendant then told witness she had missed \$5, and said that no one was there except Miss Gorst and defendant's sister, and her little children, and that she had spoken to the Chief of Police Bains, and he said it was very evident that "your seamstress has taken the money." She said she did not know what to do about it, and asked witness what she (witness) would do, would she have her arrested, and witness said no, and advised her to go and see Miss Gorst. It was after this that the defendant saw the plaintiff at Mrs. Board's, and drove her to her father's.

The evidence of Mrs. Wigle would not, I think, justify an amendment of the pleadings; for, if amended, it could not be said that the words used imported a statement by defendant that the plaintiff had committed a criminal offence. It amounts simply to an assertion of suspicion or belief on her part that the plaintiff had taken the money.

I am therefore of opinion the action failed at the trial, and should have been dismissed; and the verdict of the

jury must be set aside, and judgment entered for the defendant, dismissing the plaintiff's action, with costs.

GALT and ROSE, JJ., concurred.

[COMMON PLEAS DIVISION.]

WORDEN V. CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Failure to deliver goods—Demand of charges—Sale of property—Conversion—Damages—42 Vic. ch. 9, sec. 17, (D.)

The plaintiff on the 2nd March, 1882, delivered to the G. W. R. Co. at L., Ont., 840 bushels of oats, to be carried by said railway and connecting railways to B., Man., and there delivered to the plaintiff. The oats were shipped in car No. 6263, and while in transit were transferred to car No. 3966 of the St. P., M. & M. R. W. Co. Before the arrival of the oats, the plaintiff arranged with the defendants' agent at Winnipeg to have car 6263 stopped at Winnipeg. The oats were not stopped at Winnipeg but were carried on to Brandon. The plaintiff, before leaving Brandon and making the Winnipeg arrangement, had instructed his agent at Brandon to receive the oats. The oats arrived at Brandon on the 5th May. The plaintiff's agent at Brandon frequently applied for the same, but was informed they had not arrived. The defendants alleged that notice of arrival was sent by post card to the plaintiff's proper address at Brandon, but there was no evidence to shew that this reached the plaintiff, and the goods being of a damageable or perishable nature were, on 22nd July, sold by defendants. In an action for non-delivery and conversion.

Held, [reversing the judgment by GALT, J., at the trial] that the plaintiff was entitled to recover: that the defendants were not protected by 42 Vic. ch. 9, sec. 17, (D.) and sub-sections, for to come within it the goods must remain in the defendants' possession for at least a year, unless the tolls have been demanded from the persons liable, and payment refused or neglected for six weeks after demand; and though sub-sec. 3 says nothing of a demand, the whole section must be read together, which shews a demand was required: that the post card was not a sufficient demand, unless it was shewn to have reached the person it was addressed to; that there was no breach in not stopping at Winnipeg, as the contract to stop only applied to car 6263; and that the plaintiff was entitled to recover as damages the value of the oats at Brandon at the time of conversion; but as there were some difficulty in ascertaining this, the Court thought substantial justice would be done by allowing the plaintiff the price paid at L. with six per cent interest added.

THIS was an action for a breach of contract for the non-delivery of a quantity of oats; and also for conversion.

The cause was tried before Galt, J., without a jury, at Toronto, at the Fall Assizes of 1886, when the learned Judge delivered the following judgment :

GALT, J.—The evidence, which was principally under commission, was very voluminous, but may be summarized as follows: The plaintiff purchased a quantity of oats which were shipped by the Great Western Railway from Lucknow, under a bill of lading, dated 1st March, 1882.

The receipt bill was as follows :

“Lucknow, March 1st, 1882. Received from W. S. Holmes, the undermentioned property, in apparent good order, addressed to order William Worden, Toronto, to Brandon, Manitoba, as car No. 6263, via. G. W. R., M. C., C. S. W. St. Paul, M. & M., & C. P. Railways,” meaning thereby that the oats were shipped in car No. 6263, to be transported therein to Brandon, by the lines of The Great Western Railway, the Michigan Central, and the St. Paul, Minneapolis, and Manitoba Railway, and the Canadian Pacific Railway.

After the oats were shipped, the plaintiff being in Winnipeg applied to the agent of the defendants there to stop the oats in Winnipeg; and the following correspondence took place :

“WINNIPEG.

“MR. HARDER :

“I shipped from Lucknow, Ont., on 1st of March, one car of oats consigned to my order, Brandon, in car 6263. I would like to know if you can stop the car here.

(Signed) “T. W. Worden.”

To which Mr. Harder replied :

“Upon paying all charges, and surrendering original B. of L., you can take delivery of this car here.”

From some cause, which is not very clear, it became necessary to unload car 6263; and on the 9th March the oats were transhipped on the Minneapolis and Manitoba Railway to one of their own cars, No. 3966. Car No. 6263 never arrived at Winnipeg, nor was it ever under the control

of the defendants. Car 3966 arrived at Winnipeg some time in April, for on 20th April, on the application of one J. H. Christie, what is called a "bill of sight entry" was made at the Custom House, Winnipeg, so as to enable the oats to be forwarded to Brandon.

It does not appear that the defendants or their agents had anything whatever to do with this entry; nor is there any evidence that any information was brought to them that the oats in car 3966 had been transferred from car 6263.

The oats were then forwarded to Brandon. On their arrival, notice was given by postal card, addressed to plaintiff, "Brandon," which is the only address on the shipping bill of the St. Paul, Minneapolis, and Manitoba Railway Company.

In my opinion, the defendants were in no respect guilty of negligence, and therefore are not responsible as for a breach of contract. In fact they never made any contract with the plaintiff, unless the correspondence that took place between the plaintiff and Harder can be considered as a contract; and, if so, it had reference to the arrival and stoppage of a particular car, which never came into the possession of the defendants.

Then as to the conversion. After the oats had reached Brandon, and several notices addressed to the plaintiff, at Brandon, had been mailed, and as the oats were becoming damaged, the agent of the defendants directed them to be sold. The car arrived at Brandon on 22nd May, 1882. The oats were sold on 22nd July, 1882.

By sec. 17, sub-section 3 of 42 Vic. ch. 9 (D.) "If the tolls are not paid within six weeks, the company may sell the whole, or any part of such goods."

It appears to me that the company acted in accordance with this provision, consequently they are not liable for the conversion complained of.

The action must be dismissed, with costs.

In Michaelmas Sittings *Arnoldi* moved on notice to set aside the judgment entered for the defendants and to enter judgment for the plaintiff.

During Hilary Sittings, February 15th, 1887, *Arnoldi* supported the motion and referred to 42 Vic. ch. 9, sec. 17, sub-sec. 3 (D.); *Leslie v. Canada Central R. W. Co.*, 44 U. C. R. 21; *Gordon v. Great Western R. W. Co.* 25 C. P. 488; *Gauhan v. St. Lawrence R. W. Co.*, 29 C. P. 102, 107; *Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197, 10 A. R. 162, 11 S. C. R. 612; *Hiort v. Bott*, L. R. 9 Ex. 86, 89.

Wallace Nesbitt and *P. McPhillips*, contra, referred to *France v. Gaudet*, L. R. 6 Q. B. 199; *Scott v. McAlpine*, 6 C. P. 302; *Mayne on Damages*, 4th ed., 17; *Rodoconachi v. Milburn*, 17 Q. B. D. 316.

March 12, 1887. CAMERON, C. J.—The plaintiff caused to be delivered to the Great Western Railway Company, on the 2nd March, 1882, at Lucknow, in the Province of Ontario, two hundred bags containing 840 bushels of oats, to be carried by the said railway company, and connecting railways, to Brandon, in the Province of Manitoba, and there delivered to the plaintiff. The oats were shipped by the said Great Western Railway Company in their car No. 6263. While the oats were in transit, on account of some accident that occurred on the Minneapolis and Manitoba Railway, they were transferred from the Great Western car 6263 to car No. 3966 of the said Minneapolis and Manitoba Railway, and car No. 6263 did not, as far as the evidence discloses, reach either Winnipeg or Brandon.

Before the arrival of the oats at Winnipeg, en route, the plaintiff applied to an agent of the defendants at Winnipeg to have the said car, No. 6263, stopped at that place, and was told by the agent that upon paying all charges and surrendering the original bill of lading, he could have delivery at Winnipeg.

Owing, probably, to the change of car, the oats were not stopped at Winnipeg, but were carried by the defendants to their original destination—Brandon.

Before leaving Brandon and making the above arrangement to have the car of oats detained at Winnipeg, the plaintiff instructed an agent to receive the oats for him at Brandon.

The oats arrived at Brandon about the 5th day of May, 1882, and the defendants in their defence alleged, that after the arrival of the oats at Brandon, they caused notice thereof to be sent to the proper address of the plaintiff; and, after the expiration of the time, and in pursuance of the statute in that behalf, the said goods, being of a damageable or perishable nature, and the tolls thereon not having been paid, were sold. This sale took place on 22nd July, 1882.

The evidence on the part of the defendants shewed that notice of the arrival of the oats at Brandon was given to the plaintiff by postal card, mailed to his address, Brandon. But it was shewn that the agent of the plaintiff at Brandon, without any knowledge of this notice, applied to the agent of the defendants at Brandon for the oats, and was always informed that no oats had arrived for the plaintiff.

At the trial the learned Judge found in favour of the defendants, on the ground that they had acted in pursuance of sec. 17, sub-sec. 3, of 42 Vic. ch. 9 (D.); and dismissed the plaintiff's action, with costs.

Section 17 provides for the fixing and regulating tolls by the by-laws of the company.

Sub-section 2 enacts: "In case of denial or neglect of payment, *on demand*, of any such tolls, or any part thereof,

* * the same may be sued for and recovered in any competent Court, or the agents or servants of the company may seize the goods for or in respect whereof such tolls ought to be paid, and detain the same until payment thereof; and in the meantime the said goods shall be at the risk of the owners thereof."

Sub-section 3: "If the tolls are not paid within six weeks, the company may sell the whole, or any part of such goods, and out of the money arising from such sale retain the tolls payable, and all charges and expenses of such detention and sale; rendering the surplus, if any, or such of the goods as remain unsold, to the persons entitled thereto."

Sub-section 4: "If any goods remain in the possession of the company unclaimed for the space of twelve months, the company may thereafter, and on giving public notice thereof

by advertisement for six weeks in the *Official Gazette* of the Province in which such goods are, and in such other newspaper as they may deem necessary, sell such goods by public auction, at a time and place to be mentioned in such advertisement, and out of the proceeds thereof pay such tolls and all reasonable charges for storing, advertising, and selling such goods; and the balance of the proceeds, if any, shall be kept by the company for a further period of three months, to be paid over to any party entitled thereto."

And by sub-section 5, if such balance be not claimed within the three months, "the same shall be paid over to the Receiver-General, to be applied to the general purposes of Canada, until claimed by the party entitled thereto."

It is manifest under these provisions that to warrant or authorize a sale of goods for tolls, such goods must remain in the possession of the company for at least a year, unless such tolls have been demanded from the person liable to pay the same, and payment thereof has been refused or neglected for the period of six weeks after such demand. Sub-section 3 it is true, read by itself, says nothing about demand of tolls; but the whole section, with its sub-sections, must be read together to enable the Court to put a proper interpretation upon the section and sub-section. Then so read it would be impossible to suppose that the Legislature could have required all the formalities indicated in section 4 to be taken in order that the owner of the goods might have notice they would be sold, after the goods were held for a year, and yet permit their sale in six weeks under sub-section 3 without demand, notice of sale, or other formality whatever. The provision amounts to a statutory license to sell the goods subject to the condition that there shall be a demand of payment of the tolls upon the consignee, or owner of the goods, at least six weeks before the sale, in default whereof no sale shall take place till the expiration of thirteen months and two weeks after the goods have been carried by the railway to their destination.

It was not argued or contended on behalf of the defendants in this case, that sending the postal card to notify the

arrival of the oats was a sufficient demand ; nor could it have been properly so contended.

In *Simpson v. Routh*, 2 B. & C. 682, it was held under 27 Geo. II. ch. 20, that it was necessary to prove a demand of the overplus where a bailiff distrained for poor rates. The statute provided that such surplus should be returned *on demand*.

Chief Justice Abbott, at p. 683, said : " The second section of the Act states ' that the officer making the distress shall deduct the reasonable charges of taking, keeping, and selling such distress, out of the money arising by the sale ; and the overplus (if any) after such charges and also the said penalty or sum of money shall be fully satisfied and paid, shall be returned, *on demand*, to the owner of the goods and chattels so distrained.' If we were to hold, that an action would lie for the surplus without any demand, we should convert the statute into a snare, by which every parish officer would be rendered liable to a variety of actions. If it were necessary to pay the money without demand, it would be incumbent on the officer to follow and make a tender to the party distrained upon, in whatever part of the kingdom he might happen to be."

I refer to this case, not because it at all resembles the circumstances of the one under consideration, but because it determines, where a statute provides for something to be done on demand, the demand is a condition precedent to the enforcement of the thing to be done.

In *Belding v. Read*, 3 H. & C. 955, Martin, B., uses language that applies to the insufficiency of the demand alleged to have been made in this case. A right had been given to the defendant by deed to enter the premises of A. and take after acquired property on demand. A demand was served on A.'s wife.

At p. 963, the learned Baron said : " But in my judgment the defendant never was in a position to exercise this power, inasmuch as no sufficient demand of payment was ever made ; for I think the demand made on the wife was insufficient. There is nothing to shew that the demand on

the husband was impracticable, and the deed does not contain any stipulation that a notice may be left at the dwelling house, though that stipulation is frequently made."

Baron Bramwell, at p. 964, said: "As to the residue of the goods acquired after the bill of sale was executed, the exercise of the power was conditional upon a demand, and no sufficient demand was made."

Channel, B., on p. 966, on the same point, said: "But, inasmuch as the demand made was not a demand in accordance with the power, that was not such an act of intervention as could pass the property."

The disposal of the plaintiff's property under the provision of the Act is a *quasi* forfeiture, and no forfeiture is permitted except where the act or omission which works the forfeiture is clearly established.

There is a conflict of authorities as to the effect of sending a notice through the general post office to the address of the party entitled to receive it. Speaking for myself, a notice or demand so sent is of no avail, unless it be shewn to have reached the party entitled to it, or that method of giving notice is expressly provided by statute, or the agreement of the parties.

It is unnecessary, however, to pursue this branch of the question any further, as the frequent application of the agent of the plaintiff for the oats, and the information given by the defendants' agent, at Brandon, that they had not arrived, would be such an act of negligence as to disentitle the defendants to avail themselves of sub-section 3 under the notice they mailed to plaintiff, even assuming that notice was in terms sufficient.

By the sale of the oats there was a wrongful conversion by the defendants thereof; and the only remaining question is, what damages the plaintiff is entitled to recover? The correct measure is the value of the oats, at Brandon, at the time of the conversion. It is not very easy to ascertain accurately from the evidence what that value is.

[The learned Chief Justice then considered the evidence as to the damages, coming to the conclusion that sub-

stantial justice would be done by allowing the plaintiff the price paid at Lucknow for the oats with interest at six per cent. from 22nd of July, 1882, and continued.]

The judgment for the defendants must be reversed, and judgment entered for the plaintiff for \$400.44; that is to say, value of the oats, \$323; and interest, \$90.44, less the sum of \$13 paid into Court, with costs.

I quite agree with the opinion of my learned brother Galt at the trial, that the change in the place of delivery that the defendants assented to, had relation to the car No. 6263, and as that car never reached Winnipeg there was no breach of contract, or breach of duty on the part of the defendants in delivering the oats in question at Brandon, instead of stopping them at Winnipeg.

ROSE, J., concurred.

GALT, J., having been engaged in the case at the trial took no part in the judgment.

Motion allowed.

[CHANCERY DIVISION.]

WILSON V. GRAHAM, (2).

Tenant for life—Improvements by—Expropriation of land—Tenant for life accounting for moneys received for land expropriated.

Under the will of W. B. K., his widow E. K. took a life estate in the whole of his real property, and his son W. the remainder in fee. A railway company, after the death of W. B. K., expropriated part of the lands and paid the compensation money to E. K., who had obtained letters of guardianship of her infant children. This money she expended in making improvements in the remaining portion of the lands. After W. attained full age he sold this land with the improvements on it, E. K. joining in the conveyance in ignorance of her rights to a life estate, and receiving no compensation in respect to it. W. afterwards died intestate, and in taking the accounts in this action as against E. K. in respect to the moneys received by her as above from the railway, the heirs of W. sought to charge E. K. with the whole of the said money (less the value of her life estate), without regard to the sums spent by her on the improvement of the rest of the land.

Held, that if W. were living and making this claim, E. K. could have answered it by shewing that he had already got the equivalent by the sale of the other property long before the termination of her life estate at a value enhanced by the improvements, and that besides she had released to his purchaser her life estate, which further enhanced the amount of purchase money received by him, and since his heirs (the present claimants) could have no higher claim than he would have had if living, E. K. could answer the claim now made by them in the same way.

E. K. could not be said to occupy the position only of a tenant for life seeking to charge the estate with the value of a permanent improvement made by her, or seeking to charge the remainderman with such value or part it.

THIS was a motion on behalf of Elinor Graham to vary the minutes as settled by the judgment of the Divisional Court, reported 12 O. R. 469, and came on for argument on October 20th, 1886.

The facts are stated in the judgment.

Bruce, Q. C., for Elinor Graham. My client says she was trustee of the moneys under her letters of guardianship. She expended them on lands of her son, in which she was entitled to a life estate, and she says that she does not want to claim the expenditure so far as it was or might have been enjoyed by her as life tenant. But she does claim the expenditure so far as it enhanced the value

of the estate of her son the reversioner in the lands: *Bevis v. Boulton*, 7 Gr. 39; *Re J. T. Smith's Trusts*, 4 O. R. 518. She is called upon to account for moneys received by her as trustee under her letter of guardianship, and she is not in the position of a tenant for life asking compensation or pay for improvements made upon the land: *In re Brazill, Barry v. Brazill*, 11 Gr. 253.

Fitzgerald, contra. There was no application to the Court for the allowance of the moneys for the improvements. No authority has been found allowing a trustee for improvements made upon lands of which the trustee was tenant for life: *Dent v. Dent*, 30 Beav. 363; *Floyer v. Bankes*, L. R. 8 Eq. 115; *Gilliland v. Crawford*, 4 Ir. R. Eq. 35; *Lewin on Trustees*, 8th ed. p. 574, 716; *Re Leigh's Estate*, L. R. 6 Ch. 887; *Dixon v. Peacock*, 3 Drewry 288.

Bruce, in reply. He who comes into equity must do equity. This is not the simple case of a *cestui que trust* asking for his moneys. But those claiming under William come in and claim an account of his moneys; and the defendant says to the plaintiff, "I expended his moneys on his estate."

January 12th, 1887. FERGUSON, J.—The question for determination is, as to whether or not, under all the circumstances of the case, the defendant Elinor Graham, who was the widow of the testator, should, in taking the account against her be allowed any sum in respect of permanent improvements made by her upon the lands which were sold by her son, she, in ignorance of her right as tenant for life joining in the conveyance to the purchaser from him.

The material facts shortly stated are these:—The testator owned several acres of land in one parcel near where the Burlington station of the Great Western Railway now is. By his will he so devised this land that his widow became entitled to a life estate, and his son to the remainder in fee. The railway company expropriated part of the lands and paid the estimated value in money to the widow who had before then obtained letters of guardianship of her

children. She expended this money or a large part of it in building and making permanent improvements upon the remaining portion of the lands. Upon or after the son attaining full age he sold the land with the improvements and his mother the widow joined in the conveyance to the purchaser, thus parting with her life estate, receiving no compensation for the same, for the whole of this purchase money was paid to and received by the son. The son died intestate, his sisters, one of whom is the plaintiff, inheriting from him, the mother taking a life interest. The purchase money received by the son is not now in contention. His estate is not being administered.. The contest is as to the moneys received from the railway company upon their expropriating parcel of the land, which money I apprehend represented the land expropriated in which the widow had a life estate. The accounts are now to be taken against the widow in respect to this money received by her from the railway company, the plaintiff and other parties interested seeking to charge her with the whole sum so received (less her life interest or the value of it) regardless of the large sum thereof expended by her in permanent improvements on the other parcel of the land as aforesaid. The rights in this respect of the parties so claiming against the widow are derived solely through their brother, the son who died intestate as before stated. At the time of the expenditure in making these permanent improvements the widow had a life estate in the lands on which they were made. She was tenant for life thereof, and she was in possession, and the contention against her is, that for this reason she cannot be allowed for these improvements, or any sum on account of them.

The law, I apprehend, is quite clear that repairs and improvements, however substantial and lasting made upon the land by the tenant for life are his own voluntary act and do not arise from any obligation, and he cannot claim any charge for them upon the inheritance. The cases on this subject are numerous and many of them well known. A considerable number of these were referred to by Mr.

Fitzgerald and these I have examined. The law is summarized as said by the Chancellor in the case of *Smith's Trusts*, 4 O. R. at 522, in *Lewin on Trusts*, 7th ed. p. 503. See also the 8th ed. p. 574. On the argument it was not disputed that such is the law on the subject. The application of this proposition of law to the case would certainly operate a great hardship upon the widow of the testator and I am free to say that at the close of the argument I saw no help for it. But can the widow be said to occupy the position only of a tenant for life seeking to charge the estate with the value of permanent improvements made by her, or seeking to charge the remainderman with such value or part of it?

She is defending herself against a claim made by those who derived their right or title solely from the son, volunteers claiming through him, and, so far as I can see, having no higher or greater rights than he would have if he were living, and himself making the claim that they make. Then if he were living and making this claim could the widow answer the claim by saying that he had already got the equivalent of the amount of the claim by the sale of the property, long before the termination of her life estate at a value enhanced by these improvements, and that besides she had released to his purchaser her life estate which further enhanced the amount of the purchase money which was received by him?

In my present view of it, the case has to be looked at either as if this would be a good answer to such a claim made by the son, or as one in which the rule of law above referred to applies. Such a claim, if made by the son would certainly be a most unrighteous one and a claim that could not be allowed unless the judge or Court allowing it felt absolutely bound so to do.

The point presented is to me a peculiar one and it has given me some anxiety, but after the best consideration I have been able to give to it, and after a conference with Mr. Justice Osler, I am (with some hesitancy I confess) of the opinion that the widow (by whom I mean all along the

defendant Elinor Graham) could fully and properly answer such a claim made by her son in the way above referred to and that she is in a position to answer the claim now made by the plaintiff, and the others making it, by saying to them, that to the extent that the value of the lands sold as aforesaid by the son after attaining full age, was at the time of that sale enhanced by reason of the permanent improvements made thereon by her with the money received by her from the railway company, she satisfied the same to him, and that he and she herself were then the only persons entitled to this money, or any part of it, and that to this extent the present claim of the plaintiff and the others making it, who can have no higher claim than the son would have if living, must also be considered as satisfied.

Under all the circumstances I think there should be no costs to either party on this occasion of speaking to the minutes of the judgment.

OSLER, J. A., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

CLARKSON V. THE ONTARIO BANK.

Assignment for benefit of creditors—48 Vic. ch. 26 (O.)—Constitutionality—Retrospectivity—Payments within thirty days—Provincial legislature.

Held, following *Broddy v. Stuart*, 7 C. L. T. 6, that 48 Vic. ch. 26, (O.), is *intra vires* the provincial legislature.

Where the plaintiff sought to invalidate certain payments of money made by an insolvent debtor within thirty days prior to his making an assignment under the said Act, but before it came into force,

Held, on demurrer, that the claim could not be sustained either upon the ground that the statute was retrospective, or upon the ground that what the plaintiff sought to obtain was defined and given by sec. 3, sub-sec. 3, of the statute.

THIS was an action by an assignee by virtue of an assignment made on September 22nd, 1885, under 48 Vic. ch. 26 (O.), of the estate and effects of W. Kyle & Co. who, up to that date, carried on business as wholesale merchants in Toronto, whereby the plaintiff claimed that certain payments of moneys made by W. Kyle & Co., to the defendants, were void under the provisions of the said Act, as against the plaintiff and the creditors of W. Kyle & Co., and that the defendants should be ordered to pay the same to the plaintiff, with interest and costs of action, the said payments having been made, as alleged in the statement of claims as amended, by W. Kyle & Co. when in insolvent circumstances and unable to pay their debts in full, and knowing that they were on the eve of insolvency, with intent to defeat, delay and prejudice their creditors and to give the defendants a preference over the other creditors of the said firm, or some of them,—the defendants being at the time of such payment creditors of W. Kyle & Co.,—and the said payments having been made on account of such indebtedness, and having had the effect of giving the defendants a preference over the other creditors.

The defendants delivered a statement of defence and demurrer, which contained the following paragraphs:

2. "The defendants further say that the provisions of the Statute of Ontario, 48 Vic., ch. 26, referred to in the statement of claim, in so far as such provisions affect to provide for the appointment of assignees, and the vesting therein of all rights to sue for the rescission of agreements, deeds and instruments, or other transactions, and all other provisions of the said Act with reference to the alleged powers, rights and authorities of assignees in respect to the estates, rights and credits of debtors, are beyond the competence and authority of the Legislature of the Province of Ontario to enact, and the same are *ultra vires* and void.

5. "The defendants also demur to the said amended statement of claim, and say that the same is bad in law on the ground that it appears that the plaintiff asserts title to sue by virtue of an assignment made to him under the provisions of 48 Vic., ch. 26 (O.), and such Act does not vest in the plaintiff the right to maintain this action, and further that the said Act is *ultra vires* and beyond the power and jurisdiction of the Legislature of Ontario to enact, and confers no rights, powers or authorities upon the plaintiff in the premises, and on other grounds sufficient in law to sustain this demurrer."

The statement further alleged as to certain of the payments impeached, that the alleged causes of action in respect to them arose prior to the coming into force of 48 Vic., ch. 26 (O.), and were not subject thereto or affected thereby, and the plaintiff had no cause of action in respect thereof; and they demurred to the paragraphs of the statement of claim having reference to these payments, and said that the same were bad in law on this ground; and certain further matters of defence were set up not necessary to mention here.

The demurrer came on for argument on January 19th, 1887, before Ferguson, J.

Moss, Q. C., for the demurrer. We are not satisfied with the view of Armour, J., in *Brodly v. Stuart*, 7 C. L. T. 6. Under sec. 91, sub-sec. 21, of B. N. A. Act,—bankruptcy and insolvency are assigned to the Dominion Parliament. Armour, J.'s judgment only dealt with bankruptcy, not with "insolvency."

[FERGUSON, J.—I could not give a judgment differing from Armour J.'s judgment in *Brodly v. Stuart*.]

Proceeding to the next point, assuming the validity of the Act, what does it apply to? We say it does not apply to

matters which took place before the coming into force of the Act. The Act did not come into force till Sept. 1, 1885.

The plaintiff here seeks to recover in regard to payments made within thirty days of the assignment, and such a payment was not subject to attack prior to the passing of this Act. He admits that the defendants are creditors of Kyle & Co., and apart from any statute a creditor has a perfect right to receive payment of his debt. R. S. O. ch. 118, did not apply to a payment to a creditor, but by 48 Vic., ch. 26, sec. 3, sub-sec. 3, payments to creditors are provided for. Then for the first time such payment to a creditor is made void.

The point is covered by *Coates v. Kelly*, C. A., December 23rd, 1886, not reported. *Burland v. Moffatt*, 11 S. C. R. 76, expressly decided, as in *Lumsden v. Scott*, 4 O. R. 323, that an assignee for creditors, in the absence of such statutory enactment as in 48 Vic., ch. 26, took merely the position of his assignor and could not bring such an action as this. The Court of Appeal, in *Coates v. Kelly*, refers to these decisions, and holds that the sale having taken place before the Act, 48 Vic., ch. 26, came into operation, the position of the assignor was not affected by it. A case of *Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265, is referred to by Osler, J.A., who delivered the judgment of the Court.

Wilberforce on Statute Law, p. 157, shews as a rule statutes are not retrospective. It cannot be supposed that 48 Vic., ch. 26, was meant to apply to payments made before the Act came into force, in the absence of express language: *Williams v. Harding*, L. R. 1 H. L. 9. If anyone, prior to September 1st, 1885, had power to attack this transaction it could only be a creditor of Kyle & Co. If such right vested in a creditor, it vested in August, 1885. Was it divested by 48 Vic., ch. 26? It could only be by very clear language: *Moon v. Durden*, 2 Exch. 22.

Macdonald, Q. C., contra. In considering an Act, the Interpretation Act must be remembered, which says all

Acts are to be treated as remedial: R. S. O., ch. 1, sec. 38. There is no doubt *Coates v. Kelly* was properly decided, but is clearly distinguishable. It did not refer to money, and (2) the article was transferred more than thirty days before the assignment. The Act, 48 Vic., ch. 26, was passed in March, and on July 15th proclamation was made for its coming into force. Now, in many such cases an Act has been held to have retrospective operation. The Act provides that a voluntary assignment may be made under its provisions, and declares its effect. The assignee, it states, has the right to recover from a creditor who receives payment within thirty days of the assignment. See sec. 3 and 7. Therefore all creditors had notice; they would be in this position after August 2nd. It is no case of hardship here; but this is just where the difficulty of holding statutes retrospective has arisen. In *Pardo v. Bingham*, L. R., 4 Ch., at p. 740, Lord Hatherley refers to *Moon v. Durdan*, 2 Exch. 23, shewing it is a question of the intention of the Legislature.

[FERGUSON, J. But we are relying on the statute, not on the proclamation.]

The nearest case I can find is, *Queen v. The Inhabitants of St. Mary's Whitechapel*, 12 Q. B. 120, when the statute there in question was held to relate back. As to *Coates v. Kelly*, it is only with regard to money that an express provision is made to recover it back. In *Re Tate*, 5 L. J. N. S. 260, Mowat, V. C., held that the Dower Act, 32 Vic., ch. 7, had a retrospective operation. *Queen v. Leeds and Bradford R. W. Co.*, 18 Q. B. 343, is another case of an Act coming into effect at once, and so being held to be retrospective; *Cornill v. Hudson*, 8 E. & B. 429, is similar; *Quilter v. Mapleson*, 9 Q. B. D. 672, is the same way. The principle running through all these cases is, where time is given the element of hardship does not come in. This Act must have a favourable construction in favour of the creditors.

Moss, in reply. The argument of the plaintiff amounts to this: that what was before the passing by the Act an

innocent transaction, is singled out of the Act and affected by it, though it occurred before the coming into force of the Act. What is said is, a payment made within thirty days—this means “a payment made after September 1st, within thirty days before an assignment made under this Act.” As to the proclamation, the argument makes the effect of the Act depend upon the act of the officer issuing the proclamation. The Act does not provide that the proclamation shall issue thirty days, or any fixed period, before the Act comes into force.

[The learned counsel was here stopped.]

FERGUSON, J.—I feel bound by the judgment of Mr. Justice Armour in *Brodly v. Stuart*, 7 C. L. T. 6, and formally and without further argument give judgment accordingly against the demurrer. As to the other demurrer, the point in dispute is so plainly disclosed by the pleadings and the statute that it is not necessary for me to state anything by way of evolving what is to be decided. I am of the opinion that neither on the ground that the statute is retrospective, nor on the ground that what the plaintiff seeks to obtain is defined and given by sec. 3, subsec. 3, can the pleading demurred to be sustained, and I am of the opinion that this demurrer must be allowed. I also think that *Coates v. Kelly*, in the Court of Appeal, comprehends the principle that must govern here, and if this is so, I am bound to decide as I do.

Demurrer allowed.

A. H. F. L.

This case is now pending before the Court of Appeal.—REP.

[CHANCERY DIVISION.]

WOODWARD ET AL. V. McDONALD ET AL.

Reference to arbitration—Stay of proceedings—C. L. P. Act, sec. 214—Scope of reference—Construction of agreement—Pending action to reform—Powers of arbitration—Injunction.

By a consent judgment in an action between members of a certain pool association for the sale of lubricating oil, it was provided that "all matters which may hereafter come into dispute between the association or board of directors thereof, or any member or members * * * relative to the said agreement" (sc. the original agreement of association), "or any alleged breach or non-observance thereof, or of any of the rules or regulations made, or to be made, by the said board thereunder, and all matters of complaint by any member or members against any other member or members in respect of the premises," should be referred to arbitration as therein specified.

Acting under the agreement, the board had fixed a sum of three cents per gallon to be paid to the association by the parties thereto, on the sale of any lubricating oil.

A dispute now arose on the motion of one of the members as to whether the three cents per gallon were payable on sales made by one member of the association to another, and whether the rate was payable upon the proportion of distilled petroleum used in making axle grease.

Held, that these matters were properly within the scope of the arbitrator under the above clause in the judgment, though they amounted to a dispute upon the construction of the agreement, and the rules made under it, and it was no objection that in the course of the reference it might be necessary to procure an injunction, which an arbitrator could not grant.

Semble, if it should be established to his satisfaction that the parties ought to be relieved from certain things covered by the agreement, the arbitrator might so relieve them.

Held, also, that the mere fact of an action to reform the agreement having been brought, and being pending did not paralyze the power of the arbitrator.

Willesford v. Watson, L. R. 14 Eq. 572, followed, *Piercy v. Young*, 14 Ch. D. 200, commented on.

THIS was a motion on behalf of the plaintiffs for an injunction, and a cross-motion by one of the defendants for a stay of proceedings under the circumstances, which are fully set out in the judgment. Both matters came up for argument together on February 1st, 1887.

Magee, for the plaintiff.

Street, Q. C., for the defendant McDonald.

The following cases were cited: *Willesford v. Waters*, L. R. 8 Ch. 473; *Piercy v. Young*, 14 Ch. D. 200; *Russell*

v. *Russell*, 14 Ch. D. 471; *Campbell v. Edwards*, 24 Gr. 152; *Barrow v. Barrow*, 18 Bea. 529; *Elwes v. Elwes*, 3 DeG. F. & J. 667.

February 23rd, 1887. PROUDFOOT, J.—A motion is made on behalf of the plaintiffs for an injunction to restrain the defendants from proceeding with any arbitration before Richard Bayley, Esq., or any other arbitration under an agreement dated November 27th, 1884, respecting the Oleine Oil Association, to which the plaintiffs and defendants are parties, or under the judgment in the action by William McKay and others against the defendant McDonald.

A motion is also made on behalf of the defendant McDonald to stay proceedings in this action, because the parties had agreed to refer the matters now in dispute between them to arbitration, and at the time this action was brought the defendant McDonald had taken proceedings to have them referred, &c.

Both motions were heard together. The circumstances giving rise to them are detailed below.

The plaintiffs and defendants are members of what is usually called a pool association for the sale of lubricating oil under an agreement dated November 27th, 1884. By this agreement it was provided that the association should exist until August 31st, 1885, unless sooner terminated under the provisions of the agreement. The term lubricating oil was explained to mean paraffine, oleine, neutral or wool oils, or other lubricating oils manufactured in whole or in part from petroleum, which has been distilled or passed through the worm, and having a specific gravity of not more than 39 degrees by Beaumir hydrometer; but it should not be held to include black railway axle oil, sold directly to railway companies, or distilled petroleum sold directly to gas companies, for the purpose of making gas.

During the existence of the agreement none of the parties should sell or dispose of any lubricating oil which they should manufacture or become possessed of, otherwise than by sale under the agreement.

A board was constituted for managing the business of the association, and it had power from time to time to fix the minimum selling price of lubricating oil, and the credit that might be given, and the discount for cash; to fix the sum to be paid per gallon and the time when it should be paid to the association by the parties thereto on the sale of any lubricating oil, the sum so fixed being payable when the article sold is made entirely of distilled petroleum upon the whole quantity sold, but when forming only a compound in the manufacture of the article then based upon the percentage or quantity of distilled petroleum used in such compound.

And for violating the provisions of the agreement or any rules, &c., made in pursuance thereof, the sum of \$500 was to be the liquidated and ascertained damages.

And the board were to have power at a meeting to be held before August 31st, 1885, convened by notice, &c., to continue the association for six months from August 31st, 1885, and in like manner to make further extension.

The board from time to time fixed the minimum price and the rate per gallon to be paid to the association.

In February, 1886, the board at a meeting continued the association till August, 1886. The defendant McDonald protested against this. He was a member of the board. The meeting was summoned for the previous day, and a motion to continue was lost, and two of the directors went home, and the following day the resolution was passed. And at the next meeting in April McDonald claimed to be no longer a member of the board as the association had not been regularly continued.

In June, 1886, an action was brought by the other members of the association against McDonald for violating the terms of the agreement of November, 1884, and I understand the plaintiffs in that action, (*McKay et al. v. McDonald*), claimed that even if the association had been irregularly continued in February, 1886, yet that

McDonald had waived the irregularity by his subsequent conduct.

That action was set down for trial at the last Assizes, held at Sarnia on October 15th, 1886. A consent judgment was made, by which it was declared that the agreement of November, 1884, should be deemed to have been legally extended for six months from February 26th, 1886, and for six months from August 28th, 1886, subject to the right of termination therein contained, and then subject to renewal in accordance with the terms of it. That the defendant should not be liable to pay any damages or fines in respect of any breach or breaches of the agreement prior to October 15th, 1886, nor to pay any sum whatever into the general fund of the association upon any delivery or shipment of lubricating oil prior to 28th February, 1886, but was to pay three cents per gallon for sales of it after that date to October 15th 1886, &c.

The fourth clause of the judgment is as follows: "1. That all matters which may hereafter come into dispute between the association or the board of directors thereof, or any member or members of the association relative to the said agreement, or any alleged breach or non-observance thereof, or of any of the rules or regulations made or to be made by the said board thereunder, and all matters of complaint by any member or members against any other member or members in respect of the premises, shall be and are hereby referred to the decision and award of William P. R. Street, of London, or in case of his death, absence or refusal to act, then to the County Judge of the county of Lambton, or any person to be by him, on the application of any member or members after written notice to the other members, appointed arbitrators in the premises, and the decision and award of such arbitrator either as to any breach or non-observance of the agreement or any claim thereof, and as to the damages or money payable in respect of any such breach or non-observance of the agreement, shall be final and conclusive and binding

on all parties to such arbitrator's proceedings; it being hereby declared and agreed that such arbitrator shall not be bound in any case to award the full amount of the sum mentioned in the said agreement by way of liquidated damages, but may award such other sum in lieu thereof as he in his discretion shall think fit either by [way of actual damages, or by way of fine, or by reducing the liquidated damages, it not being intended that he shall be limited to actual legal damages, and the said arbitrator may award as to the costs of such arbitration."

Mr. Street declined to act, and Mr. Bayley has been appointed arbitrator.

On December 17th, 1886, the defendant McDonald gave to "The Imperial Oil Company (limited)" one of the members of the association notice of his complaint, that the company had committed certain breaches of their covenant in the agreement of November, 1884. That since February 28th, 1886, they had sold large quantities of lubricating oil within the meaning of the agreement, which they had not included in their weekly returns, nor paid thereon the three cents per gallon required by the rules, &c. And that in their returns the company had not set forth truly the quantity of distilled petroleum, &c., and had furnished untrue statements of the quantity sold, &c. And the defendant thereby required these matters of complaint to be referred to arbitration, &c.

An appointment was taken out to proceed with the arbitration which McDonald did not attend by mistake, and it was adjourned.

The real subjects of dispute between the parties I understand to be two: Are the three cents per gallon payable on sales of lubricating oil made by one member of the association to another? and whether the rate per gallon is payable upon the proportion of distilled petroleum used in making axle grease? The black railway axle oil mentioned in the agreement is a different thing from axle grease, which is composed of lime and paraffine oil; and it seems paraffine is distilled and passed through the worm.

Upon December 31st, 1886, the plaintiffs issued the summons in this action upon which is indorsed that the plaintiffs' claim is for reformation of a certain agreement made between the plaintiffs and defendants dated the 27th day of November, 1884, and to restrain arbitration proceedings, and for an injunction.

In support of the motion for injunction the plaintiffs filed the affidavits of F. A. Fitzgerald, M. J. Woodward, James McMillan, and John McMillan.

Fitzgerald in his affidavit, says, (19 A), it was not intended by any of the parties that axle grease should be subject to the terms of the agreement, and none of the parties have ever acted that way upon the assumption that it was subject thereto, or that the said agreement applied to it, and the defendant McDonald nor any one has ever attempted to apply the agreement to it, or to require any return of it, &c. And as regards the complaint of McDonald that pool money should be paid in respect of every sale of lubricating oil from one member of the association to another, Fitzgerald says (26) that such was not the intention of the parties to the agreement, nor of any of them as he believes when the association was formed, and it was not his intention acting for the Imperial Oil Company that the agreement should apply to such sales.

John McMillan thinks the statements in Fitzgerald's affidavit are true and correct, and he concurs with him in the belief that it was not the intention of any of the parties to the association agreement that it should apply otherwise than as stated by Fitzgerald.

James McMillan is of the same opinion as Fitzgerald as to the intention of the parties to the agreement.

Woodward's affidavit does not seem to be copied in the brief left with me. But his cross-examination on the affidavit is in the brief. In it he says that at one time (in 1886) he thought that axle grease should pay pool, and so informed Fitzgerald and the Board, but he thinks he has since changed his opinion, &c.

In opposition to the motion for injunction, McDonald has made an affidavit in which he says, that the question as to whether the provisions of the agreement should be restricted to sales from the parties to it to persons not parties was certainly never by him, nor by any one else so far as he is aware, mentioned or discussed or even referred to at the time the agreement was being entered into, or at any time before or since, till last autumn (1886); and any question as to what would be the effect of the agreement upon sales by one member to another never entered his mind, nor so far as he is aware, into the mind of any other party at the time the agreement was being prepared and executed. Had it been raised, and his attention drawn to it he would not have executed it with the alterations now proposed by the plaintiffs without, at all events, limiting in some degree the right of one member to sell to another, and fixing some payment to be made to the pool upon such sales as well as upon others, and without providing that the Board should fix a minimum price below which sales from one member to another should not be made. That he has been greatly injured by the pretended right to sell lubricating oil from one member to another without restriction as to price or quantity, &c., in a manner which he details at length. That he took no advice as to the construction of the agreement till a few days before the 15th of October, 1886, as to whether under its terms it applied to sales from one member to another, and was advised that it did; and he compromised the action because he hoped under the true construction of the agreement he should be able to insist upon the other members adhering to its terms in their sale to one another. That he does not wish to remain a member of the association if the terms of the agreement are altered, and is willing that it should be dissolved at once. He verily believes and has always believed that the article called axle grease is within the spirit and meaning as well as the letter of the agreement, and he has never waived his right to insist upon its being so treated.

The defendant has not objected to the indorsement on the writ of summonses in this action as being too vague and indefinite, if it could be an objection.

The plaintiffs contended that it was for the Court to determine what matters were to be the subject of the reference to the arbitrators, and that could not be done until the trial of the action for the reformation of the agreement.

The defendants on the other hand contend that the whole matter is properly within the scope of the authority of the arbitrator; and at any rate that the plaintiffs have not shown that they have made out any case for reformation.

The R. S. O. ch. 50, sec. 214, provides that when parties to any instrument agree that any difference between them shall be referred to arbitration, the Court or a Judge may stay proceedings on application of the defendant in any action commenced by any of the parties to the agreement, upon the Court or a Judge being satisfied that no sufficient reason exists why such matters ought not to be referred according to the agreement, and that the defendant was at the time of bringing the action and still is ready and willing to join and concur in all acts necessary and proper for causing such matters to be decided by arbitration.

As this action was begun after the defendants had taken proceedings to have an arbitration, and the arbitration is now insisted upon by them, it is clear that the last clause of the section requiring the Court or a Judge to be satisfied that the defendant was at the time of bringing the action and still is ready, &c., has been complied with.

I have further to be satisfied that no sufficient reason exists why these matters should not be referred. That depends upon the construction of the agreement, and whether the plaintiffs have shewn any case for reforming it.

For I do not assent to the argument of the plaintiff that the mere fact of bringing an action for reforming the agreement paralyzes the power of the arbitrator.

The terms of the reference are very full, it covers any matters in dispute between the association, or any member or members of it *relative to the agreement, &c.*, see it set out *ante*, p. 674, wide enough to cover the present contention of the defendants, and specifically applied to disputes relative to the agreement or breaches of the rules and regulations. And in effect this is conceded by the plaintiffs in bringing their action to reform it. Whether the reference empowers the arbitrator to decide that payments are to be made to the pool in respect of sales from one member to another, and upon the paraffine used in the composition of axle grease, are disputes relative to the agreement. And since the Common Law Procedure Act it is no longer an objection that the jurisdiction of the Court is ousted. The Legislature have determined that. Nor is it any objection that in the course of the reference it may be necessary to procure an injunction which an arbitrator cannot grant.

I am unable to distinguish this in principle from *Willesford v. Watson*, L. R. 14 Eq. 572, 8 Chy. 473. The submission there, it is true, empowered the arbitrator, among other things, to decide disputes upon the construction of the agreement, but the decision did not turn upon that alone, but upon the other terms also. The defendant also set up some agreement or understanding at variance with the reference to which the Court thought it quite within the power of the arbitrator to give effect. And if it should be established in this case to his satisfaction, that the parties ought to be relieved from certain things covered by the agreement, the arbitrator might so relieve them. And especial care has been taken to leave it in his discretion whether to assess the whole liquidated damages for breaches of the agreement, or to award some other sum in lieu of them, thus enabling him to do complete justice between the parties. The power of the arbitrator here also extends to disputes relative to the agreement, which is equivalent to the power in *Willesford v. Watson*, to decide upon the construction of the agreement. Lord

Selborne in that case, p. 478, after remarking upon several terms of the reference, proceeds to consider the reference, "or touching these presents, or any clause, or matter, or thing herein contained or the construction thereof." He says "whenever, therefore, there is a dispute between the parties as to whether the instrument, according to its true construction, does or does not warrant the particular thing to be done; they have agreed that that dispute shall be referred. Surely then it would be extravagant to say that if the Court thinks that, according to the true construction of the instrument, the thing ought not to be done, therefore it is not to be referred." And (at p. 477) he says: "It struck me throughout that the endeavour of the appellants has been to require this Court to do the very thing which the arbitrators ought to do; that is to say, to look into the whole matter, to construe the instrument, and to decide whether the thing which is complained of is inside or outside of the agreement." And (at p. 479) in speaking of the effect of the clause, "or touching the rights, duties, and liabilities of either party in connection with the premises," he says: "I cannot help thinking it reasonably clear that, under these words, if subsequently to the execution of the lease there had been communication between the parties, and the landlord had given a verbal consent to something which the lease did not authorize, and money had been expended upon the faith of the thing being done, that would be a matter which the arbitrator would with perfect propriety take into account. So if there were a contemporaneous collateral agreement having any equitable force, which added something or took something away from the rights of either party, I cannot but think that these words would perfectly authorize the arbitrator, and, indeed, make it his duty, to take all those matters into account in order to see what were their mutual rights and liabilities in respect of the demised property at the time when the question arose."

The terms of the reference here are as ample as in the clause above commented on. They include "all matters

of complaint by any member or members against any other member or members in respect of the premises." And the language of Lord Selborne is as applicable to the present case as to that in which it was uttered.

I was referred, however, to *Piercy v. Young*, 14 Ch. D. 200, in which the Court of Appeal seems to have held that the question "whether the matters in dispute are within the agreement for arbitration is one which the Court will decide, and will not leave to the arbitrator." But that is a very peculiar case; the agreement to refer was the shortest Sir George Jessel ever saw. It was: "Any differences or disputes which may arise between the partners shall be settled by an arbitrator to be agreed upon between the partners, and his decision shall be final and binding upon all parties," language so wide as to cover disputes of any kind about any subject, and not limited to the matters of the partnership, in the agreement for which it was contained, and it was sought to apply it to matters outside the partnership. Sir George Jessel attempts to shew, but in my opinion not successfully, that Lord Selborne was of opinion with him in *Willesford v. Watson*, that the Court will determine what matters are within the reference. It seems to me impossible to place such a construction upon the language of Lord Selborne, and the other Lord Justices who agreed with him. But I think that the decision in *Piercy v. Young*, must be limited to such a reference as was then in question. Sir George Jessel says (p. 208): "Of course persons can agree to refer to arbitration, not merely disputes between them, but even the question whether the disputes between them are within the arbitration clause," and I think that was just what was done in *Willesford v. Watson*, and in this case.

Taking this view of the case it is perhaps not necessary to consider whether the plaintiffs have made out a case for reforming the instrument, but I may remark that the basis of such a suit is, that there was a different agreement between the parties from that which appears in the writing, and it is sought to reform or rectify the writing to make

it express the true terms of the agreement. But the plaintiffs in their affidavits make no such case, the utmost they say is, that it was not the intention of the parties to come under the obligations of the written agreement as to sales from one member, to another, or as to axle grease. But they do not say that the matter was discussed; that it was a subject of dispute, or of contradictory views finally settled down in the terms of the written agreement or intended so to be. And the defendant swears that it was not even mentioned. So that there was no mutual mistake, no agreement at variance with the writing, and nothing to reform it by. As was said by Turner, L. J., in *Elwes v. Elwes*, 3 DeG. F. & J. 667, 681: "I do not find that in the whole course of the negotiations for this re-settlement one single word was said upon the subject of the £100,000, charge, or of the term for securing it, and the plain result of the case seems to me to be, that to grant the prayer of the bill would be, not to correct the settlement according to the agreement of the parties, but to add to their agreement a term which had not been determined upon or even agitated between them."

I therefore refuse the motion for an injunction, with costs, and grant the order to stay the proceedings in this action, with costs.

A. H. F. L.

[COMMON PLEAS DIVISION.]

PROCTOR V. MULLIGAN.

*Sale of land—Recovery of purchase money—Independent agreements—
Specific performance—Rescission.*

On the 5th June the plaintiff executed an agreement whereby he agreed to purchase from defendant a lot in Winnipeg, at and for the sum that might be placed thereon by D., provided that if the price exceeded \$6,000, the excess should be secured by the plaintiff, by mortgage on the property. The sum so fixed to be paid by plaintiff "deeding" to the defendant his interest in certain lots in Toronto. On the same day defendant executed an agreement whereby he agreed to purchase the plaintiff's interest in the Toronto lots for \$6,000, the defendant to pay the interest and taxes to date, but to deduct same out of the \$6,000. The Toronto property was conveyed to the defendant who entered into possession and paid off the mortgages on it. The defendant refused to convey the Winnipeg property except for \$8,000, at which sum he contended D. had valued same, but the evidence shewed that D. had declined to make any valuation. The defendant also refused to appoint another valuator. In an action to recover from defendant the sum of \$6,000, the plaintiff intimated he would accept a conveyance of the Winnipeg property in settlement of his claim on defendant paying the costs.

Held, that unless defendant accepted the offer, then there should be judgment for the plaintiff for the \$6,000, less \$838.28 paid for interest and taxes.

Seemle, that the two agreements must be deemed to be independent.

Held, also, that this was not a case for specific performance nor for rescission.

THIS action was brought to recover the sum of \$6,000, alleged to be due from the defendant to the plaintiff, and was tried before Cameron, C. J., without a jury, at Toronto, at the Fall Assizes of 1886.

George Proctor was the owner of certain property in the City of Toronto. James Mulligan was the proprietor of a lot in Winnipeg. On the 5th day of June, 1884, Proctor executed the following agreement :

"I, George Proctor, of the City of Toronto, in the County of York, hotel-keeper, hereby agree to purchase from James Mulligan, of the same place, all and singular, lot 82, in the Parish of St. James, in the City of Winnipeg, containing one quarter of an acre, more or less, on which is erected a two and a-half storey frame house, at and for the sum that may be placed upon the same by Mr. Dexter, of the City of Winnipeg. Provided, nevertheless, if the price so fixed exceed six thousand dollars, that the amount exceeding that sum be secured by mortgage by the said Proctor on said property, payable in four years, with interest at 6 per

cent., payable half yearly. The sum so fixed to be paid by the said Proctor, by deeding his interest in lots 36, 37, 38, 39, 40, and 41, on the south side of Czar street, according to plan D 276, registered in the Registry Office in the City of Toronto. The said Proctor to search the title at his own expense, said Mulligan not to produce any title deeds, abstracts or evidence of title other than those in his possession. This agreement to be completed within fifteen days from the date hereof. Time to be of the essence of this agreement."

On the same day the defendant executed the following agreement :

"I, James Mulligan, of the City of Toronto, in the County of York gentleman, hereby agree to purchase from James Proctor, of the same place, all and singular, Proctor's interest in and to lots 36, 37, 38, 39, 40, and 41, on the south side of Czar street, according to plan D 276, filed in the Registry Office in the said City of Toronto, at and for the sum of six thousand dollars; the said Mulligan to search the title at his own expense, said Proctor not to produce any title deeds, abstracts or evidence of title other than those in his possession. Mulligan to pay interest and taxes to date but deduct the same out of the \$6000. This agreement to be completed within fifteen days from date hereof. Time to be strictly the essence of this contract."

The evidence, so far as material, is set out in the judgment.

The learned Chief Justice entered a verdict for the defendant.

In Hilary Sittings *Osler*, Q. C., moved on notice to set aside the judgment entered for the defendant, and to enter judgment for the plaintiff.

During the same Sittings, February 17, 1887, *Osler*, Q. C., supported the motion, and referred to *Fry* on Specific Performance, 2nd ed., 152, 158, 204; *McDonald v. Murray*, 2 O. R. 573.

Lash, Q. C., contra, referred to *Rose v. Anger*, 22 Gr. 525; *Fry* on Specific Performance, 2nd. ed., secs. 335, 337, 338, 346; *Wallace* on Specific Performance, secs. 146-8.

March 12, 1887. GAIT, J.—At the trial, Kent, the subscribing witness to both agreements, and by whom they were drawn, in answer to the question of the learned

Chief Justice: "What was the arrangement between them, exchange of property or was it absolute purchase by one party of the Toronto property and by the other of the Winnipeg property? stated: "I understood it to be absolute purchase. I asked Mr. Mulligan if he had a solicitor. I think he said there was some difference between him and Mr. Haverson; and he was asked to have Mr. Fraser act for him. I asked him if it was absolute sale; and I drew it in that way; and I kept the two properties separate and distinct, the transactions independent. The Toronto property was fixed at \$6000 at that time. That is how I understood it. That is what they told me, and I wrote it out accordingly."

One of the contentions of the learned counsel for the plaintiff on the argument before us, to which I shall have occasion to refer, was based on this being the true state of the case.

Shortly after the agreements were made the defendant went to Winnipeg and, according to his evidence, saw Mr. Dexter, and drove him out to see the Winnipeg property; and that then Mr. Dexter valued it at \$8000.

This evidence is not in accordance with that of Dexter. He states that Mulligan drove him to see the lot, and "he asked me what I thought it was worth, that is this land and the house that I am referring to. I told him, to the best of my recollection, that this house and land we had walked over were worth in the neighbourhood of \$8000." Mr. Dexter's evidence was taken under commission. In answer to the question: "You did not like to assume the position of arbitrator as it were in this matter? No. I did not want to have anything to do with it. I may have expressed myself to Mr. Mulligan to that effect. I have no doubt I told Mr. Mulligan at the time that I did not want to act."

I may refer also to his letter of 26th November, 1884, as shewing that he had not acted, and declined to act, as valuator.

This is conclusive against the assertion of the defendant that Mr. Dexter had fixed the price of the Winnipeg lot at \$8000; and it is quite unnecessary to allude further to the evidence. The dispute between the parties is one of law, not of fact.

After the return of Mulligan it appears, from a statement made by Mr. Fraser, acting as counsel for the defendant, that owing to some questions respecting the title of the plaintiff to the Toronto property, the conveyance thereof was not made to the defendant until November. It was then made, and the defendant entered into possession, and has ever since been in receipt of the rents and profits. The defendant has persistently refused to convey the lot in Winnipeg unless the plaintiff will take the same at the price of \$8000. He has refused, and still does refuse, to appoint another valuator.

Under these circumstances, this action was brought to recover \$6000 as the price of the Toronto property.

The Chief Justice at the trial gave judgment dismissing the plaintiff's action, on the ground that the contract was not to pay in cash, but by an exchange of property.

Against this judgment a motion was made.

The only question of fact referred to by Mr. Osler was, as to whether there were two agreements or only one. The evidence of Mr. Kent unquestionably proves he thought there were two; but the Chief Justice was of opinion that, although there were in fact two separate agreements, that the two together constitute only one, viz., that the plaintiff should transfer his property in Toronto for the sum of \$6000, receiving in exchange the lot in Winnipeg at a valuation to be placed upon it by a named valuator, so that so far there was only one agreement. But we are not at liberty to disregard the express words of the defendant's agreement, wherein no reference is made to the lot in Winnipeg, but which appears to have had regard to, a payment in cash, as by the concluding paragraph it is provided: "Mulligan to pay interest and taxes to date, but deduct the same out of the \$6000." The defendant also

acted as if there were two agreements, because he accepted an assignment of the Toronto property without making a conveyance of the lot in Winnipeg.

It is manifest that the dispute between the parties cannot remain as it now is. The defendant is in possession of the property of the plaintiff, and has given nothing in return. If he had relied, as he states, on the valuation of Dexter, he should not have accepted the conveyance from the plaintiff until the plaintiff had accepted a deed of the Winnipeg lot; but having done so he cannot refuse to carry out the arrangement and refuse to execute a deed of the Winnipeg property unless at a price put upon it by himself. This is not a case in which specific performance can be decreed. The price was to be fixed by a valuator who has refused to act.

In *Darbey v. Whitaker*, 4 Drew. 134, the Vice-Chancellor says, at p. 140: "Now I assume it to be clear that this Court has no power to decree specific performance of a contract for sale or purchase at a price to be fixed by arbitration, unless the arbitrators have actually fixed the price."

See also the case of *Tillett v. Charing Cross Bridge Co.*, 26 Beav. 419, and the other cases in *Fry* on Specific Performance, 2nd ed., secs. 338, 342, 352.

I agree with the opinion expressed by the Chief Justice, that the price of the Winnipeg lot was not to be less than \$6000, although, from the terms of the contract, there was nothing to prevent Mr. Dexter putting such price upon it as he thought fit.

Mr. Osler, at the conclusion of his argument, stated the plaintiff was willing to accept a conveyance at that price upon the defendant paying the costs of this suit. It is left entirely with the defendant to decide whether he will accept this offer. If he does, then the plaintiff will receive a conveyance; but, if he refuses, then this motion will be made absolute, to enter a judgment for the plaintiff for the sum of \$6000, less the sums of \$183.13 and \$655.15, as per Exhibit 6, the correctness of which was not disputed, making

in all the sum of \$838.68, leaving a balance of \$5161.72, with interest from November, 1884, with costs, the date at which the conveyance was executed to the defendant. The defendant to be allowed time until the first day of April to make his election.

ROSE, J.—The question of dependent or independent covenants received much attention and consideration in *McDonald v. Murray*, 11 A. R. 101.

On p. 121 may be found an extract from the judgment of Tindal, C. J., in *Stavers v. Curling*, 3 Bing. N. C. 355, at p. 368. He said: "The rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way."

Looking at the agreement signed by Mulligan we find it in terms a complete agreement for the purchase of the city property—the price fixed at \$6000, and provision made for deduction thereout of interest and taxes, which he was to pay to the date of the agreement.

The agreement is under seal; there are no words of exchange; no reference to any other agreement, and on it action is brought to recover the purchase money.

On the same day Proctor agreed to purchase from Mulligan the Winnipeg property. The agreement does not fix the price. That is to be fixed by Mr. Dexter; and, whatever the sum may be that he names, is to be the amount of the purchase money.

I read that agreement as binding the parties to it by whatever sum Mr. Dexter might place upon it, whether it be more or less than \$6000.

The argument that the provision, viz., "the sum so fixed to be paid by the said Proctor by deeding his interest in lots 36," &c., coupled with the preceding clause,

as to receiving any excess over \$6000, shews that Proctor was to pay \$6000 in any event, and more if Dexter placed a value upon the land exceeding \$6000, seems to me to be answered by the fact that provision for paying the excess prevents the words being taken literally.

If Proctor was to pay the sum "so fixed" by the conveyance of the Toronto property, then no matter at what sum it was "so fixed," the consequence would be payment whether the sum were \$1000 or \$10,000. But that is not so as plainly appears from the provision for payment of the excess over the \$6000.

Full meaning can be given to all the words by reading the agreement as providing that Proctor was to purchase the Winnipeg property at a price to be fixed by Dexter; if it was more than \$6000 he was to secure the excess by mortgage on the Winnipeg property; if less, then Mulligan was to pay him the difference.

He was not expected to pay any money down. In fact, it was well known that he could not; and Mulligan, in the other agreement, agreed to advance or pay the arrears of interest and taxes on the Toronto property.

There was no necessity to protect Mulligan against the payment of money as he apparently had plenty of it; and the agreement of purchase he entered into does not protect him.

There was every necessity to protect Proctor against a demand for money as he was without ready means; and the agreement of purchase entered into by him provides for payment by conveyance of land.

The result would be that if Mulligan was able to give Proctor the Winnipeg property, he would have to pay money only in the event of the price of the Winnipeg property being fixed at less than \$6000.

If Proctor was unable to convey the Toronto property Mulligan could recover damages in an action upon the covenant, if no other remedy were open.

Having in view the evidence of Mr. Kent, the action of Mulligan in completing the purchase of the Toronto pro-

perty by taking a deed and going into possession, which he has had for over two years, his paying off the mortgages, a very large sum, several thousand dollars, it seems to me we are justified in holding that the agreements were and are intended to be independent in this sense, that Mulligan agreed to pay \$6000, less the amount paid by him for interest and taxes, unless he conveyed the Winnipeg property.

It will be observed that Mulligan was to retain out of the \$6000 the amount paid by him for interest and taxes. This would be an impossible thing unless he was to pay something in cash.

I am glad to find some support for this conclusion in the judgment of Mr. Justice Fry in the *Odessa Tramways Co. v. Mendel*, 8 Ch. D. 235, at p. 244, where he gave judgment enforcing one of two contemporaneous agreements. It is "that where it is apparent on the face of even a single agreement that the parties intended that it should be carried into effect piecemeal, then a default in the performance of one part of the agreement is no defence to an action for the specific performance of another part. I find a negotiation which is said to have been commenced for one agreement, and that the parties have agreed to separate it into two distinct parts, and I infer that they have done so for the good and valid reason that they desired that the one part should be enforceable even if the other was not."

The case is reported in that volume in the Court of Appeal, at p. 246; and no question was raised in appeal as to the correctness of the view of Mr. Justice Fry.

This language is peculiarly applicable to the facts of this case as shewn by the two distinct paper writings under seal and the evidence of Mr. Kent as extracted by my learned brother Galt.

But whatever may be the fact, whether the covenants are to be construed as dependent or independent, the position of the parties at present is as follows:

Mulligan has taken a deed and is in possession; over two years of the term of the lease have expired; he has paid

a very large sum in discharging mortgages on the property and offers to reconvey on receiving payment of the amounts he has paid out,—which is a sum that, it is said, is impossible for the plaintiff to pay.

Dexter has refused to fix the price of the Winnipeg property. We cannot name another, and Mulligan refuses to name another, although Proctor consents. Mulligan, improperly, has endeavoured to force the Winnipeg property on Proctor at \$8000, averring that Dexter fixed that sum as the price, which it is clear he never did.

The result is, Mulligan is owner and in possession of the Toronto property, without payment to Proctor of anything. Proctor has not got and cannot get the Winnipeg property because of Mulligan's perverseness, and cannot get back his Toronto property except on performance of a condition to him impossible, and if he got it back the term would not be of as much value as when Mulligan went into possession.

I do not think it is a case for rescission, as Mulligan cannot hand back the property as he received it. See *Fry* on Specific Performance, 2nd ed., sec. 712; *Western Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. 145, at p. 164.

Mr. Osler offered to take the Winnipeg property at \$6000 if Mulligan would pay the costs, or rather that his client would take a conveyance of the Winnipeg property in settlement of his claim against Mulligan, if Mulligan would pay the costs. In such event all matters would be settled between them.

This appears fair; and, if not accepted, I think, judgment must be entered for Proctor for \$6000 and interest since Mulligan obtained his deed, with costs of action. From the \$6000 must be deducted anything paid by Mulligan for interest and taxes due up to the date of the contract.

CAMERON, C. J., having been engaged in the case at the Assizes, took no part in the judgment.

Motion allowed.

[QUEEN'S BENCH DIVISION.]

BRADY ET AL. V. SADLER ET AL.

Evidence—Crown patent—Reservation of land covered with water—Application papers in Crown Land Department.

On the 10th of January, 1852, the Crown granted lot No. 9 in the 4th concession of the township of Ops, "exclusive of the lands covered by the waters of the Scugog River," which were reserved. An affluent of the Scugog flowed through the said lot and entered that river at the south-west corner of the lot. At and prior to the time of the issue of the patent there was a dam upon the river Scugog, built by the Government, which raised the waters of the river, and penned back those of the affluent, and flooded a portion of the said lot; and those through whom the defendants claimed had also, for many years prior to the issuing of the patent, with the authority of the Public Works Department, maintained a bracket board one foot high upon the dam, still further flooding the lot to the extent of about four acres. The correspondence and papers in the Crown Lands office shewed that the reservation extended to all the land covered by water as they then existed, "formed by the mill-dam on the river Scugog."

Held, that, in construing the patent, reference might be had to papers in the Crown Lands Office connected with the application for the patent, and that the reservation in the grant covered the land drowned by the waters of the river Scugog and its affluent as backed by the dam with the bracket boards.

ACTION claiming an injunction under the circumstances set out in the judgment, and which was tried at the last Chancery Sittings at Lindsay, before Proudfoot, J.

James MacLennan, Q.C., Moss, Q.C., and O'Leary, for the plaintiffs.

S. H. Blake, Q.C., and Stewart, contra.

The authorities relied on are also referred to in the judgment.

April 26, 1887. PROUDFOOT, J.—This action is brought for an injunction to restrain the defendants from putting bracket boards on a dam on the river Scugog by which the water was raised to the injury and damage of the plaintiffs; and for damages to their lands and crops; and for other relief, &c.

The defendants, among a number of defences, put the plaintiffs to the proof of their title to the land in question,

being lot 9 in the 4th concession of the township of Ops; and if the plaintiffs are unable to establish their title to the land it will not be necessary to consider the other defences.

The land was granted to Michael Brady on the 10th January, 1852, by the Crown, by the following description, viz: "All that parcel of land situate, lying, and being in the township of Ops, in the county of Victoria, in our said Province, containing by admeasurement sixty acres, be the same more or less; which said parcel or tract of land may be otherwise known as follows, that is to say, being composed of lot number nine in the fourth concession of the aforesaid township of Ops, exclusive of the lands covered by the waters of the Scugog river, which are hereby reserved, together with free access to the shore thereof for all vessels, boats, and persons."

It appeared in evidence that the East Cross Creek, an affluent of the Scugog, flows through lot nine, and enters the Scugog River at the southwest corner of lot nine.

This lot nine lies about five miles up the River Scugog from the dam of the defendants. The dam was erected in 1843, and it had the effect of damming back the water so as to cover about 136 acres of lot nine; but of this the plaintiffs do not complain: what they do complain of is that the defendants put bracket boards on the dam, which in the dry season back water upon about four acres more than the dam alone would do.

The plaintiffs' contention is, that the mention of sixty acres as the contents of the lot is an error, and that they are entitled to the whole of the lot not affected by the waters backed by the dam alone: that the language of the patent must be strictly construed; and that nothing is reserved but what was covered by the waters of the Scugog at the time of the grant; and that no reference can be made to the petition, surveys, plans, and papers in the Crown Lands Office to determine what is the operation of the grant. The plaintiffs also contend that no land of the plaintiffs is covered by the waters of the Scugog, but

only by the waters of the East Cross Creek, which are penned back by the waters of the Scugog. If this last argument be valid, it is equally applicable to the land covered by the water penned back by the dam alone as to that penned back by the bracket boards; but of that penned back by the dam the plaintiffs do not complain; and if valid, the reservation reserves nothing. The evidence that showed the water drowning the land to be that of the East Cross Creek necessarily invites an inquiry as to what the Crown meant by the reservation, and for that purpose recourse may be had to the circumstances connected with the grant.

If there had been a simple grant of lot nine, the erroneous mention of the number of acres would not have restricted it, as in *Iler v. Nolan*, 21 U. C. R. 309, or a mistake in the number of chains of the boundary, as in *Cartwright v. Dettlor*, 19 U. C. 210, and other cases cited for the plaintiffs; because, as said by the Court, the lots are described in such a manner as to shew that the intention was to grant the entire lots; or, as said by Robinson, C. J., in the former case, "It, the patent, grants, therefore, the whole of that lot, just as a patent for any other lot is always understood to carry the whole lot, without regard to its exact contents, or the expressed length of its side lines, or its nominal width." But in the same case he says if the patent had professed to grant only a part of the lot it would have been otherwise.

In that case, and in *Stevens v. Buck*, 43 U. C. R. 1, and in many cases collected there, and in *The Trent Valley Canal*, 12 O. R. 153, it appears that reference may be had to the surveys, in the Crown Lands Office, and to other grants, and surveyors' field notes, and I see no reason why the papers connected with the application of the plaintiff may not also be referred to.

It will be remembered that the dam was built in 1843. In 1846 Michael Brady caused Mr. Dennehy, a P. L. S., to survey lot nine, and to make a diagram of it. This diagram was sent to the C. L. O. by Mr. Dennehy. It is dated 22nd

June, 1846, and marks fifty-one acres and twenty-one perches on the north-east corner of the lot, and nine acres on the south-west corner, as dry land, and all the rest of the lot as permanently drowned by Cross Creek and Marsh. It was accompanied by a certificate of the same date certifying that he had surveyed lot nine for Michael Brady, the occupant, and he says: "This lot is broken by the river Scugog on the west, and East Cross Creek and Marsh on the south. All the dry land, including some of the marshy or low land, which could be brought into a state of usefulness is sixty acres and twenty-one perches, which I have valued at ten shillings per acre. The remaining 139 acres, 3 roods, 21 perches, includes drowned land, marsh, and water, is of little or no use whatever, and might be included in the patent at the nominal value say of £5, which is about $8\frac{1}{2}d.$ per acre, and which the said Michael Brady is willing to pay. I beg leave to state that all patents that may be issued for lands along the Scugog River and the East and West Cross Creeks, as they are called, should have a reference to the dam at Lindsay, in order to stay any claims for future compensation that might arise."

On the 17th August, 1847, the assistant commissioner of Crown lands reported on the petition of Michael Brady to be allowed to purchase lot nine. In this report he refers to a letter of the district agent, Mr. Ferguson, dated the 28th May, 1847, and to Mr. Dennehy's certificate and sketch, shewing that in consequence of the position of Scugog River and East Cross Creek there are about sixty acres of dry land, which he values at ten shillings per acre; and he suggests that the whole lot be granted petitioner on payment of the £30 for those sixty acres; and the assistant commissioner recommended that the petitioner be allowed to purchase at ten shillings per acre the northeasterly sixty acres of the lot in question; but neither marshy land nor land covered with water can be included in the patent unless by actual purchase. It will be seen that the assistant commissioner does not quite correctly state the effect of Mr. Dennehy's certificate, for he did not

suggest that the whole lot should be granted on payment of ten shillings per acre for the sixty acres, but did suggest the grant of the remainder of the lot for £5; nor did he say the sixty acres were the north-easterly part of the lot, nine acres being on the south-west corner.

On the 24th August, 1847, a committee of the executive council on land applications made a report, which was approved by His Excellency the Governor-General in Council on the following day, recommending that petitioner be allowed to purchase at ten shillings per acre the north-easterly sixty acres of the lot in question; but that neither the marshy land nor the land covered with water can be included in the patent unless under an actual purchase of the same.

On the 5th May, 1851, the District agent at Peterborough wrote to the Commissioner of Crown Lands transmitting a diagram of the lot with Dennehy's certificate of the value of 140 acres of it, and saying that the remaining 60 acres were purchased some time ago by Mr. Michael Brady, who is desirous of obtaining a deed for the full lot, provided Mr. D.'s valuation will be accepted for the drowned land; and on the 13th May, 1851, the Commissioner of Crown Lands informed the district agent the Department will have no objection, upon payment of £5 in addition, to grant a patent to Michael Brady for the whole lot, reserving all the land covered by waters, as they at present exist, formed by the mill dam on the River Scugog.

Michael Brady paid £35, and on the 10th January, 1852, the grant was made in terms above set forth.

I think it is plain that the reservation in the grant was intended to cover, and it does no violence to its language to hold that it does cover, the land drowned by the affluent of the Scugog; and so far as the dam without bracket boards is concerned the plaintiffs do not dispute this.

The facts regarding the bracket boards are the following: In 1847 Hiram Bigelow was the owner of the mill supplied with water power by the dam in question, and he applied to the Public Works department for leave to put

on these boards ; and on the 5th June 1847, Mr. Pegley, an officer in that Department, wrote to him as follows : " In reply to your request to be permitted to raise the water in Lake Scugog one foot higher than last year during the season of low water, I am directed by the Commissioner to state that you may do so, provided it will not subject the department to claim for damages from individuals owning property in the vicinity of the lake, and that you do the work at your own expense. Should the Department from any cause find it necessary to lower the water to its former level you will be required to remove any planking or timber work which you may have put on without remuneration for either labor or material."

In pursuance of this permission Mr. Bigelow put on the bracket boards in that year 1847, and my conclusion, from the evidence of numerous witnesses, often conflicting in their statements, is, that these boards were for many years subsequent to 1847 and to 1852 placed on the dam in such a way as to raise the water one foot during the season of low water, and that they were so placed in the years 1851 and 1852.

The plaintiffs contended that this permission not being under seal was not binding on the Crown ; that it was, at most, but a license, and was revoked by the granting of the land to the plaintiffs ; and that the boards were not shown to have been on at the date of the grant.

I do not think it of importance to inquire whether the license was binding upon the Crown or not, for the question is, how was the water at the time of the contract with the Crown, as it was the land then covered by the water that was reserved.

If there had been a simple grant of the lot to the plaintiffs it may be assumed, rightly or wrongly, that it would have revoked the license ; but it is not a grant of the lot without more, for there is the reservation, and what I have to ascertain is, the extent of the reservation, and that at the date of the letter to the Commissioner of Crown Lands of the 13th of May, 1851, for the patent must be assumed

to have been issued in pursuance of that letter which accepted the plaintiffs' offer for the whole lot.

It has been held in *Campbell v. Young*, 18 Gr. 97, that the use of bracket boards on a mill is such an easement as the Statute of Limitations will protect: that it is not necessary they should be on for the whole time, but only when the water is low. The license was a permission to use them, and they had been so used for four or five years before the grant without complaint by the plaintiffs, and the reservation should therefore be construed as a reservation of the land covered by the waters as backed by the dam with the bracket boards on.

The evidence shewed that the boards were usually placed so as to intercept the water in May or June, and were I to have to determine if they were in that position on the 13th May, 1851, I would, under the evidence, hold that they were. But it does not seem to me necessary to decide that point, for if they were not on it was because the water was then so high as not to require them, and the reservation would be of land covered by water as high as the bracket boards would have raised it in the dry season. Whether the boards were on or off, therefore, the plaintiffs fail to shew any title to the four acres now in question.

The dam was a government work, built for the purpose of improving the navigation of the Scugog, and hence the necessity for applying to the Public Works Department for permission to raise the water.

I think the action fails, and judgment will be for the defendants, with costs.

I must express my regret that there should have been such a costly litigation, involving the examination of many witnesses, and employing five or six learned gentlemen, as to the right to property which at the outside could not have been worth \$40 an acre, or \$160 altogether.

Judgment for defendants, with costs.

[CHANCERY DIVISION.]

McGUIN V. FRETTS.

Receiver—Right of action—Adding party—Amendment.

A receiver has no right to sue in his own name for a debt due to the person or corporation whose assets he has been appointed to receive; nor can that right be conferred on him by order. But where by an *ex parte* order made in the action in which the plaintiff was appointed receiver, he was authorized to bring actions in his own name for the collection of debts due to a certain Grange, and brought this action pursuant thereto, it was

Held, that an amendment should be made adding the Grange as co-plaintiffs without security being given for their costs, they being insolvent. If there were no person in whose name the action could be brought, there would perhaps be jurisdiction to direct it to be brought in the name of the receiver.

THIS was an appeal to the Divisional Court by the plaintiff from the judgment of Armour, J., at the trial at Belleville, dismissing the action upon the ground that the plaintiff had no right to sue in his own name for a debt due to the Lennox and Addington Division Grange of the Patrons of Husbandry, No. 19, of which he had been appointed receiver, and refusing an amendment applied for at the trial adding the Grange as plaintiffs. In the action of *Snider v. The Lennox and Addington Grange*, a decree was made for the winding-up of the Grange, and appointing the plaintiff receiver; and subsequently on 1st March, 1886, an *ex parte* order was made by the Master-in-Chambers authorizing the receiver to commence and prosecute actions in his own name against all persons found by the Master's report to be indebted to the Grange, and he began this action accordingly.

The objection to the plaintiff's status was taken in the statement of defence, and again at the opening of the trial, but it was not pressed till the plaintiff had closed his case, when after argument Armour, J., allowed the objection and refused the amendment.

The appeal was heard on the 25th of February, 1887.

Reeve, Q. C., for the appellant. On the general question whether the receiver ought to sue in his own name the authorities are conflicting, but there is no case which shews that the Court cannot authorize the receiver to sue in his own name. The onus is on the defendant to shew that the Court had no jurisdiction to direct that the receiver should sue in his own name. The authorities on the general question are: *Ex parte Harris*, 2 Ch. D. 423; *Hills v. Reeves*, 31 W. R. 209; *Davis v. Gray*, 16 Wall. S. C. U. S. 203; *Gill v. Baylis*, 72 Miss. 424; *Hardwick v. Hook*, 8 Georgia 354; *Manlove v. Burger*, 38 Ind. 211; *Lathrop v. Knapp*, 37 Wis. 308; *High on Receivers*, 2nd ed. pp. 174-7; *Kerr on Receivers*, p. 157.

On the question of amendment the learned Judge thought he had no power at the trial to substitute one plaintiff for another. The amendment sought was not so much that as an amendment of the description of the plaintiff by adding the name of the Grange, and stating that the plaintiff is appointed receiver for it. I cite the following as authorities on the question of amendment: *Lord Bolingbroke v. Townsend*, L. R. 8 C. P. 645; *National Bank v. Hamburger*, 2 H. & C. 333; *Mills v. Scott*, L. R. 8 Q. B. 496; *Trustees of Methodist Church v. Grewer*, 23 C. P. 533; *McCleneghan v. Gray*, 4 O. R. 329; *Clowes v. Hilliard*, 4 Ch. D. 413; *Duckett v. Gover*, 6 Ch. D. 82; *Val de Travers Co. v. London Tramway Co.*, W. N. 1879, p. 46; 48 L. J. Q. B. 312; *Broder v. Saillard*, 2 Ch. D. 692; *House Property Investment Co. v. H. P. Horse Nail Co.*, 29 Ch. D. 190; Rule 90, O. J. A.

Moss, Q. C., and *Deroche*, for the respondent. The objection was made in the statement of defence and the plaintiff might have amended at that stage. The Judge at the trial intimated his opinion before the evidence was gone into. In the face of these facts the application to amend made after the close of the plaintiff's case and after the Judge had ruled against the status of the plaintiff was too late. The defendant took the objection in the only possible way; he could not have moved to

stay the action; he was not a party to the original suit and had no opportunity of moving against the order authorizing the receiver to bring the action.

The plaintiff has no right under the order, or otherwise, to bring the action in his own name. The defendant is a stranger to the plaintiff, and had nothing to do with the proceedings in the former suit, in which orders were made behind his back. If a cause of action is vested in one person, can another person have that cause of action vested in him by a simple order of the Court directing him to sue? The question is, has the receiver a vested cause of action against the defendant? They referred to *Campbell v. Lapan*, 19 C. P. 31; *Wood v. McAlpine*, 1 A. R. 234. If the Grange had been the plaintiffs in this action we should have filed a counter-claim against them for negligence, which we cannot do against the present plaintiff. As to whether, in the absence of an enabling statute, a receiver can sue in his own name, see *High on Receivers*, p. 170, sec. 209; *Zeager v. Wallace*, 41 Penn. 294; *Pitt v. Snowden*, 3 Atk. 750. Even where a receiver has been appointed by way of equitable execution, he will not receive the conduct of the action: *In re Hopkins*, 19 Ch. D. 61. The receiver is only an officer of the Court, and when he acts must do so in the name of the person he represents. There is no privity between the defendant and the receiver here, and none can be created except by assignment or vesting order. Whether or not there was jurisdiction in the Court to make the order authorizing the receiver to sue in his own name, it does not bind the defendant nor transfer the cause of action. The defendant is entitled to all the rights against the Grange which he would have had if the order had not been made.

As to the amendment asked the application was not only too late, but under the circumstances it should not be made at any stage: *Walcott v. Lyons*, 29 Ch. D. 584; *New Westminster v. Hannah*, 24 W. R. 899; *Dalton v. Guardians of S. Mary's*, 47 L. T. N. S. 349; *Hathaway v. Doig*, 6 A. R. 264; *Fryan v. National Provident Institute*, 16 Q. B. D. 678.

As to the rights of persons against whom actions are brought by receivers: *High on Receivers*, 2nd ed., p. 203; *Wilson v. Allen*, 6 Barb. 545; *Garver v. Kent*, 70 Ind. 428; *Moriarty v. Kent*, 71 Ind. 601; *Justice v. Kirlin*, 17 Ind. 528; *Freeman v. Winchester*, 18 Miss. 577; *Gordon v. Fetterley*, per *Spragge*, C., November, 1876 (unreported); *Reeve*, in reply, cited *Woodward v. Shields*, 32 C. P. 282.

March 5th, 1887. *BOYD, C.* An *ex parte* order was made in Chambers in the action of *Snider v. The Lennox and Addington Division Grange of the Patrons of Husbandry, number Nineteen*, by which the receiver of the defendants was authorized to commence and prosecute actions in his own name, in the proper Courts in that behalf, against all parties found by the Master's report to be indebted to the defendants therein, for the recovery of the said debts. Pursuant thereto this action was begun by the receiver in his own name against the defendant, who sets up in defence that he was not privy to the order aforesaid, or to any of the proceedings in the former action, and that no right of action was vested in the receiver in respect of the debt sued on.

The receiver is the proper person to collect and get in the outstanding debts. Payment to him is a proper discharge of the debt, and where there is no dispute he alone should act in the premises: *Wood v. Hutchings*, 2 Beav. 294; *Wickens v. Townsend*, 1 R. & M. 361. But if litigation is needed to recover the alleged debt, it must be prosecuted in the name of the person having title to recover at law. The receiver is no more than an officer of the Court who becomes custodian of the assets when received, and has no right to sue in his own name for a debt. How can that right be conferred upon him, by an order such as the present, authorizing him to sue in his own name? The usual practice is, in proper cases, to direct the action to be brought in the name of the creditors: *Dacie v. John*, McLel. 575. If there is no person in whose name the action can be brought, it may be that there would be jurisdiction to

direct the action to be in the name of the receiver, as was suggested by Jessel, M. R., in *Hills v. Reeves*, 31 W. R. 209, and as appears to be also indicated by the Irish M. R. in *Acheson v. Hodges*, 3 Ir. Eq. R. 522. But apart from special circumstances I find no authority for giving permission to the receiver to sue in his own name in respect of a right of action which is vested in another. In *Hills v. Reeves*, *supra*, the controversy arose between receivers—one of them having done wrong by the removal of important documents, the Court allowed the other receivers to sue the wrongdoer therefor. In *ex parte Harris*, 2 Ch. D. 423, the sum claimed was due to the receiver in his capacity of receiver, arising out of his dealings with assets in his hands which he had sold to the debtor, against whom he was proceeding. There was direct privity of contract between them.

It is not needful to resort to the cases from the States' Courts, because they depend on local statutes and also on special practice which has not obtained here: See the observations of Burton, J., in *Dickey v. McCaul* (a), on this point. The course of procedure which governs us is sufficiently laid down in Daniell's Ch. Prac., viz.: that the right of the receiver to bring actions against persons who are not parties to the suit for the collection of debts is subject to two restrictions: (1) the sanction of the Court must be previously obtained, and (2) the action must be brought in the name of the party in whom the legal right or title to the property to be recovered is vested (b).—p. 1439.

This is a case, however, in which an amendment should have been made by adding the name of the Division Grange as co-plaintiffs. The receiver has sufficient interest to remain a co-plaintiff, because he represents the creditors and has the right to receive the moneys recovered for distribution among them. All that is needed is, the use of the name of the Division Grange, for they have no substantial interest in the debt as they are insolvent, and it is not needful to

(a) Court of Appeal, March 1st, 1887, will appear in 14 A. R.—REP.

(b) See *Daniell's Ch. Prac.*, 6th ed., vol. 2. p. 1701.

direct that security for costs be given to the added plaintiff, as in cases of dealing with solvent concerns, for the fact of the receiver being co-plaintiff will protect the Grange in this direction. As to the terms of amendment, it should be with costs, to abide the result of the litigation and then to be disposed of by the Judge who tries the case. The objection as to the sole right of action in the receiver might have been raised in a summary way at an early stage in the pleadings instead of at the trial, and the defendant might have pleaded his set-off or counterclaim as against the receiver, so as to have had all the matters litigated on the record. The defendant should now be allowed to plead further as advised. If the defendant prefers he may be allowed the costs as of a successful demurrer in lieu of all other costs occasioned by the amendment, and if he thus elects, the amount will be allowed on the terms of the plaintiff paying such costs.

PROUDFOOT and FERGUSON, JJ., concurred.

Judgment accordingly.

[CHANCERY DIVISION.]

RE CANNON—OATES V. CANNON (2).

Administration proceedings—Statute of Limitations—Champerous agreement

O. brought in a claim in certain administration proceedings on promissory notes assigned to him by H. & Co., under an agreement between them, which, however, was held void for champerty, and O.'s claim on the notes disallowed: (see the report, ante p. 70). O. thereupon, re-delivered the notes to H. & Co. The six years allowed by the Statute of Limitations had expired before the notes were thus delivered to H. & Co., but not before the date of the administration order, nor before O. tried to prove on them in the administration proceedings.

Held, that the order for administration prevented the bar of the Statute of Limitations.

Held, also, that H. & Co. might now assert their title to the notes, and prove on them notwithstanding the former champertous agreement with O.

AFTER the decision in this matter, of October 23rd, 1886, reported *ante*, p. 70, the notes in question were re-transferred to Howland & Co., who, on November 30th, 1886, obtained leave from the Master to come in and prove their claim thereon.

The defendant Mary Ellen Cannon now appealed from this ruling upon the following grounds as set out in the notice of motion:

1. That the matter was abated, and that until it had been revived or some one had obtained the carriage of the order no application could be made on behalf of the said W. P. Howland & Co.

2. That the said W. P. Howland & Co. were not creditors within the meaning of the order made in this matter and dated the 23rd day of October last (a), inasmuch as their claim was founded upon the same debt upon which the said plaintiff had attempted to prove a claim.

3. That the matter of the said claim was *res judicata*.

4. That the said claim was barred by the Statute of Limitations.

5. That the said W. P. Howland & Co. were bound by the said order of the 23rd day of October last and could not and cannot acquire any higher rights than the said plaintiff.

6. That by reason of the agreement between the said plaintiff and the said W. P. Howland & Co. the said W. P. Howland & Co. had debarred themselves of all right to prove upon the said notes in this matter and that if they desired to make a claim they must bring a separate and independent action.

(a) See ante p. 70.

7. That the administration suit having been founded on a claim upon these notes the said W. P. Howland & Co. by whose authority and concurrence the said order was granted cannot now, while the said order is standing in the name of the said William H. Oates, withdraw the said notes and prove a separate claim in their own name, in other words there cannot be a suit in the name of Oates, founded on them and the said Howland & Co. prove a separate claim on the same notes in their own names.

8. That the result of the Master's ruling is to allow the said W. P. Howland and Co. to take advantage of proceedings under an order which was wrongfully obtained upon the notes upon which they now make a claim.

And, at the same time, the defendant also appealed from the subsequent ruling of the Master, on January 15th, 1887, whereby he allowed to Howland & Co. their said claim.

The grounds of this latter matter of appeal were thus set out in the notice of motion :

1. Because the said claim was barred by the Statute of Limitations in force in this Province.

2. Because the matter affecting or relating to the said claim was *res judicata*.

3. Because the said W. P. Howland & Co. are not creditors within the meaning of the order of the 23rd day of October last, and this matter or action was not retained for their benefit inasmuch as their said claim is founded on the same debt upon which the plaintiff proposed to prove in this matter.

4. That the said W. P. Howland & Co., if they acquired any title at all, acquired the same from or through the plaintiff and did not and could not acquire a higher title than the plaintiff had and could not sue or prove on such claim, it having been declared that the plaintiff could not.

5. That the said W. P. Howland & Co. are subject to and bound by the order of the said 23rd day of October last, for among other reasons that this matter was originally instituted for and on behalf of the said W. P. Howland & Co., and they are bound by any order of this Court made against the plaintiff.

6. The said W. P. Howland & Co. by reason of the agreement made between them and the plaintiff have debarred themselves of all right to prove in this matter upon the debt upon which their claim has been allowed by the said Master and to the benefit of the order of the 19th day of September, 1884 (*b*), because the said W. P. Howland & Co. had already presented the same claim through the plaintiff who acted with their authority and for the joint benefit of himself and them in en-

(*b*) This was the administration order.

deavouring to prove the said claim, and the proof thereof had been rejected in this matter and the invalidity of the said notes was declared against the said plaintiff and against the said W. P. Howland & Co.

7. That the proceedings in this matter by the said plaintiff on the said notes having been set aside as regards the said plaintiff so that he can claim no benefit therefrom were in reality set aside as against W. P. Howland & Co. who are equally disabled from receiving any benefit from these proceedings for the same reasons for which the plaintiff was disabled, and they cannot use those abortive proceedings as in any way keeping alive their claim or preventing the running of the Statute of Limitations.

As the proceedings were for their mutual benefit so they must equally take the consequences of their invalidity, and that the proof now attempted by the said W. P. Howland & Co., after those proceedings are set aside, put forth at a late period is a stale claim and is not saved from the action of the Statute of Limitations, and was not at the commencement of the proceedings on their also appearing in a different capacity as an inchoate independent claim to be brought in on its own merits at any stage of the proceedings which were at the very same time going on based on these very notes.

8. Because the claim was brought in too late, being after the time appointed by the Master, and that the said W. P. Howland & Co., having allowed the said plaintiff to institute proceedings on the said notes and chosen to allow him to claim them as his, should be bound by the rules, and not be allowed after the time is past to make second proof and get the advantage of the former illegal proceedings.

The matter came up for argument on February 3rd, 1887, before Proudfoot, J.

McMichael, Q.C., and *A. Hoskin*, Q.C., for the defendant. The matter abated by reason of the plaintiff ceasing to have any claim: *Bell v. Bell*, 12 W. R. 230; *Imbley v. Allsop*, 9 W. R. 649; G. O. Ch. 485.

Howland & Co. parted with the ownership, or at all events the control of the notes. The claim on them has been presented and has failed. That decision really determined the claim now made: *Hilton v. Wood*, L. R. 4 Eq. 432. If Howland & Co. stand remitted to their original rights they are barred. They want to step into Oates's shoes, but they come too late. The right to enforce the claim is not preserved by the order in a suit for the benefit of creditors: *Munby v. Munby*, 3 Ch. D. 101; *In re Greaves*, *Bray v. Tofield*, 18 Ch. D. 551; *Berrington*

v. *Evans*, 1 Y. & C. 434; *In re Paris Skating Rink Co.*, 15 Ch. D. 959; *Smith v. White*, L. R. 1 Eq. 626; *Sprye v. Porter*, 7 E. & B. 58. The claim previously made by Oates was made for the benefit of himself and Howland & Co. The latter cannot claim the benefit of the administration order without eliminating the champertous proceedings. We refer also to *Vivian v. Westbrooke*, 19 Gr. 461.

Arnoldi, contra. The Master allowed Howland & Co. to come in, as they alleged themselves to be creditors, and on such application he could not try the merits: *Holms* Ch. O. 291; G. O. Ch. 434, 435; *Lashley v. Hogg*, 11 Ves. 602; *Angell v. Haddon*, 1 Mad. 529; *Brown v. Lake*, 1 DeG. & S. 144. As to the matter being *res judicata*, Oates was not acting for Howland & Co., but for himself. *Hilton v. Wood*, L. R. 4 Eq. 432, is in our favour. The administration order prevents the operation of the statute: *In re General Rolling Stock Co.*, L. R. 7 Ch. 646; *Ex parte Forest*, 2 Giff. 42. The right to recover on these notes must be somewhere, and if the agreement between Oates and Howland & Co. was void, Howland & Co. could prove. I refer also to *In re Monteith, Merchants Bank Monteith*, 6 C. L. T. 404; *Cameron v. Wolfe Island Co.*, 6 P. R. 91; *Spencer v. Williams*, L. R. 2 P. & D. 230.

February 23rd, 1887. PROUDFOOT, J.—Some time ago (23rd October, 1886,) I held that Oates had not established a legal title to the promissory notes upon which he had applied for and obtained an order for the administration of A. M. Cannon's estate; and I would have set aside the order but for the fact that one Taylor, a creditor of the intestate, had proved a claim under it. The objection to Oates's title to the notes, which I sustained, was, that they were obtained by him under a champertous agreement, or an agreement savoring of champerty, with W. P. Howland & Co., the original holders of the notes. The agreement between these parties was not produced before me on the former occasion,

but it has now been produced, and I notice that it differs in some particulars from the account given of it by Oates in his examination, and upon which the parties were content to rely. One statement that Oates was careful to emphasize was, that he was not to give Messrs. Howland & Co. one-half of what might be recovered upon the notes, but a sum equal to one-half; while the agreement itself provides for the payment to them of "one-half of the net amount I receive on account of the said notes."

Since my decision of the 23rd of October, and in the month of November, 1886, I think, the notes were handed back to Messrs. Howland & Co.

Messrs. Howland & Co., then on November 30th, 1886, obtained leave from the Master to come in and prove their claim on the 13th of December last.

The Master certified on the 13th of September last that he had advertised for the creditors of A. M. Cannon, and that the time for sending in claims expired some time before that date.

The defendant, the administratrix, appeals from the order of the Master upon a number of grounds, several of which I overruled at the time of the argument.

The principal arguments for the defendant at the hearing were, that at the time of the order for administration being made, Messrs. Howland & Co., were not the holders of the notes having transferred them to Oates: that Howland & Co., were bound by the decision against the notes in Oates's hands: that before they got back into Howland & Co.'s hands the notes were barred by the Statute of Limitations, and therefore no order should have been made allowing them to prove upon them. And lastly that the notes were barred by the statute. The two last may be considered together.

To understand these arguments it will be necessary to refer to the original agreement between Oates and Howland & Co., and the dates of the several matters involved.

The agreement between Oates and Howland & Co. is in the following terms:

"TORONTO, February 28th, 1884.

"I have this day bought from Messrs. W. P. Howland & Co. three promissory notes made in their favour by A. M. Cannon, one for \$1,000 due one year after date, one for \$3,218, due two years after date, and one for \$3,218, due three years after date, all bearing date September 5th, 1877, in consideration for which I agree to pay the said W. P. Howland & Co. one-half of the net amount I receive on account of the said notes, and I agree to use my best endeavours to collect the same, and if at the expiration of two years I have been unable to collect any portion of the said notes I hereby agree to return them to the said W. P. Howland & Co., free from any costs or charges incurred by me. But if at any time previous to the expiration of the two years above mentioned, I have succeeded in collecting any portion of the said notes, then their portion, above mentioned will be due and payable to the said W. P. Howland & Co.

WM. H. OATES."

The order for administration was made on the 19th of September, 1884, upon the application of Oates, swearing that the estate was indebted to him upon these promissory notes. Upon the 14th April, of 1885, Oates filed an affidavit proving his claim upon these notes, and also a claim for \$200 or \$300, this last claim the Master has found against him.

The notes were all dated the 5th of September, 1877, payable at one, two, and three years respectively; as to the first one the time for payment was enlarged at A. M. Cannon's request, and by his promise to pay it, till the 1st of May, 1879. So that six years elapsed after the first note was due on the 1st of May, 1885, after the second note on the 5th of September, 1885, and after the third note the 5th of September, 1886. So that the Statute of Limitations had not run as to any of the notes when the order for administration was made on the 19th of September, 1884, nor when Oates attempted to prove upon them on the 14th of April, 1885, but it had run as to all before the notes got back into the hands of W. P. Howland & Co.

It does not appear when the claim of the creditor who came in under the decree was proved, but it is not perhaps material; for although but for his claim I would have set aside the administration order, yet I think I cannot treat the date of that proof as the date of the order; if the proof saves the order it saves it from the date of the order.

Upon the former occasion I held that Oates had not established a title to the notes, because of the vice of the agreement under which he held them, but nothing was decided as to the right of Messrs. Howland & Co., upon them. The order was not obtained by Oates as agent for them, but on his own right as owner. That title was defective, but it did not make him the agent of the real owner, because he could not shew title in himself. The title remained in Messrs. Howland & Co., and it seems to be established by *Hilton v. Wood*, L. R. 4 Eq. 432, that they might assert their title notwithstanding the agreement with Oates. It is said that they had parted with the ownership, or at all events the control of the notes, and were not entitled to, or at least did not, get them back again till after the statute had run. But the two years within which Oates might sue upon them was a term of a void agreement, which Oates could not have enforced against them, and Messrs. Howland & Co., might notwithstanding have proved upon the notes in the administration suit. They, indeed, allowed the time fixed by the Master for the proof of claims to elapse, but while the estate remained unadministered, and before the Master has in fact made his report, I apprehend that it was in the Master's power to enlarge the time for proof.

The administration order directed that all necessary inquiries be made, accounts taken, costs taxed, and proceedings had for the administration and final winding-up of the personal and real estate of the intestate, and for the adjustment of the rights of all parties interested therein.

It was therefore for the benefit of all creditors of the intestate; and Lord Redesdale in *Largan v. Bowen*, 1 Sch. & L. 296, 299, says that from the moment of the decree the Court proceeds on the ground that the decree is a judgment in favour of all creditors, and that all ought to be paid according to their priorities as they stand.

The case of *In re Greaves, Bray v. Tufield*, 18 Ch. D. 551, to which I was referred, does not apply to this, for there the statute had run before the decree in the credi-

tor's suit was made, while in the present case the order or decree for administration was made before the statute had run. What Sir George Jessel decided was, that the pendency of an action did not now save the statute, as had been decided in *Sterndale v. Hankinson*, 1 Sim. 393. But he says nothing against the effect of a decree in saving the statute, and I apprehend that *Largan v. Bowen*, *supra*, declares what is still the law of the Court. See *Kerr on Injunctions*, 1st ed., 107.

I have considered this case with attention, for my impression at the argument was rather inclined to the position that the remedy upon the notes was barred. But in *Hilton v. Wood*, L. R. 4 Eq., 432, at p. 439, I find Malins, V. C., saying: "But no authority was cited, nor have I met with any, which goes the length of deciding that where a plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise. It is clear that the bargain between the plaintiff and Mr. Wright amounted to maintenance, and if the latter had been the plaintiff suing by virtue of a title derived under that contract, it would have been my duty to dismiss his bill," every word of which applies to this case. Messrs. Howland & Co. had the title to the notes, the agreement with Oates I have held to be champertous, and accordingly refused relief to him upon the notes, but that does not affect the title of Howland & Co., who might, notwithstanding that agreement, assert their original title. They were therefore creditors when the order to administer was made, and before the statute had run.

I must therefore dismiss the appeal, and with costs.

A. H. F. L.

[CHANCERY DIVISION.]

THE CORPORATION OF THE CITY OF LONDON V. CITIZENS
INSURANCE COMPANY.

*Guarantee—Sureties by independent contracts—Contribution—Discharge—
Joint sureties—Co-sureties—Application of payments—Interest.*

The C. company and D. by separate independent contracts guaranteed to the plaintiffs the good conduct in office of B. their city chamberlain, who afterwards was guilty of misconduct within the guarantees. The guarantee of the C. company contained a proviso that as against every person then being or thereafter becoming security or surety for the said B. as aforesaid, the C. company should have and possess the right of rateable contribution and all other the rights and remedies, both legal and equitable of co-sureties. The scope of D.'s guarantee included, and was more extensive than that of the guarantee of the C. company. The plaintiffs now sued the C. company on their guarantee, who, as a defence, set up that the plaintiffs had discharged D. from liability under his policy, and that this also discharged them.

Held, that even if the plaintiffs had so discharged D., this operated only to release the C. company to the extent to which they would have had a right of contribution from D., and that they would have been discharged to this extent as a matter of equity, independently of their contract.

The C. company and D. could not be considered in any sense joint contractors or joint sureties.

Ward v. The National Bank of New Zealand, L. R. 8 App. Cas. 755 followed.

Soon after B.'s defalcations were discovered he died, and after his death his executrix handed over certain of his property to a trustee, who was also an officer of the plaintiffs, to realize and apply the money therefrom towards satisfying B.'s defalcations, but without indicating to what part of such defalcations it should be applied. The trustee applied it towards satisfaction of the earlier of B.'s liabilities, in respect to which the defendants were not liable, since by a condition of their policy they were not liable except for losses occurring within a year before notice of claim made to them.

Held, that the case was similar to payment made by a debtor to a creditor without express appropriation, in which case the creditor could appropriate it, and the defendants had no right to complain of the appropriation made in this case.

Held, also, that the defendants should pay interest on the amount due from them, from three months after the proofs of loss were delivered.

THIS was an appeal from the report of the Master at London in this action, upon grounds set out in the judgment. The action was brought by the corporation of the City of London against the Citizens Insurance Company of Canada, upon a policy of guarantee, dated May 1st, 1869, whereby in consideration of a premium of \$100, they covenanted with the plaintiffs to reimburse them the

amount of any loss not exceeding \$10,000, which during the continuance of the policy should be sustained by them by reason of any act of fraud or dishonesty of John Brown, the Chamberlain of the plaintiffs during the time he was in their service as Chamberlain.

The plaintiffs set out this policy in their statement of claim, and alleged among other things, not necessary to notice here, that during the currency of it, by the reason of Brown's fraud and dishonesty in the performance of his duties as such officer, they sustained a loss of upwards of \$50,000, and claimed \$10,000 and interest.

The defendants in their statement of defence, amongst other things, alleged that the said policy was granted upon the express understanding and agreement that, as against every corporation or firm then being or thereafter becoming security or surety for the said John Brown in his employment as aforesaid, the said company should have and possess the right of rateable contribution, and all other the rights and remedies, both legal and equitable of co-sureties; that one James Durand became, and was a co-surety with them in the sum of \$5,000; and after the alleged loss the plaintiffs released and discharged Durand from all liability under his said bond or obligation; and, also, that the said policy was granted on the express condition that every person at any time making any claim thereunder, should, at the defendants' costs, whenever required so to do, afford every description of aid for the purpose, among other things, of enforcing rateable contribution by or from every or any other corporation, or from any party being or becoming surety for the said employee as aforesaid; and that Durand became and was a co-surety as above mentioned, and after the alleged loss the plaintiffs released and discharged Durand from all liability under his bond; and by way of counter-claim the defendants set up that after the alleged loss Brown died, and shortly after all his real and personal estate was conveyed by the executrix and devisee under his will to certain persons as trustees for the purpose of realizing the same, and of paying to the

plaintiffs the amount of the liability of the said Brown to the plaintiffs for the losses alleged to have been sustained by them by reasons of his fraud and dishonesty; and they claimed to have a rateable proportion of the amount received and to be received by the plaintiffs under the said trust deed, applied towards payment of any sum for which they might be found liable, in the proportion that the latter bore to the total amount found due by the said Brown to the plaintiffs under the said policy, and for all necessary accounts and enquiries for that purpose and further relief.

By reply, the plaintiffs alleged that the monies realized on the trusts of the said deed were with the concurrence of the parties to the said deed appropriated to and applied in payment of that part of the claim of the plaintiffs against Brown, which arose upwards of twelve months before the notice of claim under the policy sued on was given by the plaintiffs to the defendants, and which part of the said claim far exceeded the whole amount realized under the trusts of the said deed, so that the defendants were not entitled to any credit in respect thereof.

It appeared, and it was set up in the defendants' statement of defence, that the third condition endorsed on the policy was to the effect that it should only extend to cover such losses as might have been incurred by reason of any act of fraud or dishonesty committed by the employee within the period of twelve months previous to the date of any notice of claim that might be made under it.

On April 2nd, 1884, an order was made making the Guarantee Company of North America parties, and authorising them to appear at the trial of the action (*a*).

On April 26th, 1884, judgment was given referring it to the Master at London, to enquire what loss the plaintiffs had sustained (if any) by reason of any act of fraud or dishonesty of Brown, (if any) between certain dates therein

(*a*) This was because by a transaction between themselves and the Citizens Insurance Company the Guarantee Company had assumed the liabilities of the former in respect to this and other guarantees as after January 1st, 1882.—REF.

mentioned; to enquire and state how much had or could be realized from the estate of Brown on account of the alleged defalcations, and the amount (if any) which the defendants were entitled to credit for as against their liability to the plaintiffs (if any) as aforesaid; and to enquire as to the security (if any) the plaintiffs had from any surety for the said Brown, and to report whether the defendants are entitled to the benefit thereof or any part thereof.

The Master made his report accordingly on October 29th, 1886, the contents of which are sufficiently set out in the judgment, as are also the other material facts, and from that report the defendants now appealed.

The appeal was argued January 20th, 1887, before Ferguson, J., and it was agreed that this should also be treated as a hearing on further directions.

Rae, for the defendants, appellants. We contend that owing to the action of the council, Durand is discharged: *Nevill v. Corporation of the Township of Ross*, 22 C. P. 487; *Brice on Ultra Vires*, 2nd ed., p. 567; *Croft v. The Town Council of Peterborough*, 5 C. P. 35. At the time of the resolution the bond had been sued on but no judgment recovered. The council were in the position of a trading corporation, and had the same power to do what they did do as to give a gratuity to a servant. See *Ward v. National Bank of New Zealand*, 8 App. Cas. 755.

[*W. R. Meredith*, Q. C. There is no contract for joint suretyship at all, only co-suretyship.]

The defendants are entitled to a ratable proportion of the whole amount recovered from the estate of Brown: *Hobson v. Buss*, L. R. 6 Ch. 772; *DeColyar on Guarantees*, 2nd ed., p. 205, 298, 304.

Creelman, for the Guarantee Company, third parties, referred to *Thornton v. McKewan*, 1 H. & M. 525; *Brandt on Suretyship*, sec. 373; *Bardwell v. Lydall*, 7 Bing. 489.

[*Meredith*.—*Ellis v. Emmanuel*, 1 Ex. D. 157, reviews all the authorities.]

W.R. Meredith, Q.C., for the plaintiffs. It is not open to the defendants to say that they are discharged. There is nothing in the pleadings on the subject. The sixth paragraph of the statement of defence reaches co-suretyship only, not joint suretyship, but only co-suretyship in severalty. Again, the resolution was bad for want of power; a by-law or legal instrument was necessary: *Corporation of Toronto v. Bowes*, 6 Gr. 1. The resolution was a clear breach of trust. Durand is still liable on the bond. See *DeColyar* on Guarantees, p. 364; *Taylor v. Bank of New South Wales*, 11 App. Cas. 596; *Pearl v. Deacon*, 24 Beav. 186; S. C. 1 DeG. & J. 461; *Wulff v. Jay*, L. R. 7 Q. B. 756; *Ward v. National Bank of New Zealand*, 8 App. Cas. 755. As to the appropriation of payments in bankruptcy or insolvency or winding-up, there must be a *pro ratu* application of the money. But this is different, and the same as a payment by the executor of Brown: *Ex parte Rushforth*, 10 Ves. 409; *In re Sherry, London, and County Banking Co. v. Terry*, 25 Ch. D. 692; *Commercial Bank v. Muirhead*, 4 C. P. 434; *Corporation of the Township of East Zorra v. Douglass*, 17 Gr. 462; *Cunningham v. Buchanan*, 10 Gr. 525. There is no pretence that an appropriation was made by the payor.

Rae, in reply. The resolution in question was within the ordinary business of the municipal council, and was not *ultra vires*. In a roundabout way the Durand obligation has been cancelled, for the action has been dropped.

January 24th, 1887. FERGUSON, J.—This is an appeal from the report of the Master at London bearing date the 29th of October, 1886. The appeal is by the defendants. The Guarantee Company was brought in and made a party at the instance of the defendants. They also take part in the appeal. The appeal is on the grounds (1) that the Master should have found that the plaintiffs had released James Durand from all liability under his bond of suretyship, and that in consequence of his having been discharged the appellants were released from any liability to

the plaintiffs on their bond (by which is meant I apprehend the policy sued on) ; and (2) that in any case paragraph 2 of the report is erroneous in this, that the Master should have held that the defendants are entitled to a rateable or proportionate benefit in the amount realized from the estate of the late John Brown being \$14,100 instead of \$2100.

The action appears to have been upon a policy of guarantee made and issued by the defendants in the month of May, 1869, in respect to the conduct of the late John Brown, who was the treasurer of the plaintiffs. The third condition endorsed upon the policy is as follows : "3. This policy shall extend to cover only such losses as may have been incurred by reason of any act of fraud or dishonesty committed by the employee within the period of twelve months previous to the date of any notice of claim."

The Master found by the report that the amount of loss in respect of which these defendants are liable is \$5964.91. This is not now disputed. The bond spoken of as the bond of James Durand, the Master finds was a bond executed by him, the late Mr. Brown and another, in which the said James Durand was bound in the sum of \$5000, and that this amount can be recovered from him unless he has been released by the plaintiffs. The Master finds that the defalcation in respect to which the bond given by Durand is applicable is the total defalcation of Brown from the date of the bond in May, 1869, to the date of his (Brown's) death in June, 1882, and that this amounted to \$56,124.99.

The Master says he finds that as to the sum of \$12,000, part of the sum of \$14,100 (from the estate of Brown); this sum had before the commencement of this suit been received and carried by the plaintiffs to the credit of the earliest items of the indebtedness of Brown to them, and before striking the balance of the total indebtedness to or loss sustained by the plaintiffs at the sum of \$80,497.33.

The Master allowed as a deduction in favor of the defendants from the sum of \$5,964.91, in respect of the \$2,100 to be realized from the estate of Brown the sum of \$149.42, and also in respect of the bond of Durand, which he found

to be a valid and subsisting security, the sum of \$535.65. These two deductions reduce the sum of \$5,964.91 to the sum of \$5,279.84.

Before the alleged discharge of Durand an action had been commenced against him by the plaintiffs upon his bond. A resolution was moved in the council of the city of London (the plaintiffs) to suspend the proceedings against Durand, and this was voted down, and lost. A resolution was then moved in the same council to the effect that Durand should be released from his obligation upon the bond, which was carried, and adopted, and as I understand entered or recorded in the book of the proceedings. These papers are not before me, but counsel agree in stating the substance of them.

This is what is relied on by the defendants when they say that Durand was discharged without any notice to them or concurrence on their part. They (the defendants) now contend that they were joint sureties with Durand, and that such release of Durand operated as a release and discharge of them all.

What the defendants set up, in their pleading, on this subject is contained in the sixth paragraph of their statement of defence, and is as follows: "In case the said policy should be produced and proved the defendants say that the same was granted upon the express understanding or agreement that, as against every corporation then being or thereafter becoming security or surety for the said John Brown, therein called the employé, in his employment as aforesaid, the said company should have and possess the right of ratable contribution and all other the rights and remedies, both legal and equitable, of co-sureties; that one James Durand became and was a co-surety with the defendants in the sum of \$5000; and that after the alleged loss of the plaintiffs through the said Brown, the plaintiffs released and discharged the said James Durand from all liability under the said bond or obligation."

From another policy of the defendants which has been left with me, and which is in a printed form of policy, I

see that this pleading sets forth accurately the substance of a condition or provision contained in the defendants policies.

On the argument, it was stated and conceded to be correct, that leaving out of the case the questions as to the total discharge of the defendants from liability by reason of what occurred in respect to the obligation of Durand, and as to the right of the plaintiffs to make the appropriation that they did make of the \$12,000 received from the estate of Brown, before the commencement of this action, the defendants have, by the report of the Master, all the benefits they now contend for, and that the questions to be determined by me upon this appeal were really only two—namely, (1.) Was there the alleged total discharge of the defendants; and (2.) Have the plaintiffs the right as against the defendants so to appropriate this sum of \$12,000?"

As to the alleged discharge: In the case of *Ward v. The National Bank of New Zealand*, 8 App. Cas., at p. 765, Sir Robert P. Collier, delivering the judgment of the Court, said: "The right of contribution was established in the case of *Dering v. Lord Winchelsea*, 1 Cox 318, affirmed by Lord Eldon, in *Craythorne v. Swinburne*, 14 Ves. 169, and is thus explained by Lord Redesdale in *Stirling v. Forrester*, 3 Bli. 590: "The principle established in the case of *Dering v. Lord Winchelsea*, is universal, that the right and duty of contribution is founded on doctrines of equity, it does not depend upon contracts. If several persons are indebted and one makes the payment, the creditor is bound in conscience, if not by contract, to give the party paying the debt, all his remedies against the other debtors. * * It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause the other debtors to be exempt from payment."

Now, I think that what is contained in the condition or proviso in the defendants' contract, and stated in the pleading that I have before referred to, expresses nothing

more than was and is well established as a matter of equity, and that the contract would, in this particular respect, be of the same effect if it did not contain this proviso or condition. The defendants would, on payment by them, as a matter of law, have the right of contribution as against their co-sureties, in as full a manner as stated in this proviso or condition, if this had been left out of the contract altogether.

The defendants did not contract jointly with Durand nor did Durand contract with them. Moreover, that in regard to which the defendants by their contract became sureties was not at all co-extensive with that in regard to which Durand by his contract became surety. The one, it is true embraced the other, but much more than this other; and in no way, that I can consider the matter can I arrive at the conclusion that the defendants and Durand were joint contractors or joint sureties, and besides, a joint suretyship is not set up in the pleadings. In the same case in 8 App. Cas. and on the same page Sir R. P. Collier says: "But where it is no part of the contract of the surety that other persons shall join in it, in other words, where he contracts only severally, the creditor does not break that contract by releasing another several surety, the surety cannot therefore claim to be released on the ground of breach of contract. It is true that he is entitled to contribution against other several sureties to the same extent as if they had been joint, but the right of contribution among such sureties depends not upon contract but on principles established by Courts of Equity."

In *Brandt on Suretyship*, sec. 373, it is stated: "When by the act of the creditor the surety has been deprived of the benefit of a fund for the payment of the debt, and the contract by which the surety is bound is not changed, he is only discharged to the extent that he is injured, as in such case it is the fact that he is injured that entitles him to the discharge. But where the creditor relinquishes a security for the debt, and thereby materially alters the contract, the surety is wholly discharged, whether he is

injured or benefited, because in such case it is no longer his contract." The latter part of this statement of the law may seem capable of being, to an extent, misunderstood, but the case put in the text by the author shews the full meaning, and that the ground is, that the contract for which the surety became responsible has been changed.

Now, if it be assumed that the plaintiffs, by the act that they did, effectually discharged Durand from all liability upon his bond, I think it would not follow, and that the authorities shew that it would not follow that by reason thereof the defendants would be discharged *in toto* from their liability upon their contract, because it was not a joint contract, and they were not joint sureties with Durand; and the effect of the release of Durand would not, in such case, be to change the defendants' contract but only to deprive the defendants of a certain right of contribution which they had, and their release or discharge by reason of the act of the plaintiffs would be confined to the extent of their right of contribution. The Master has treated the bond given by Durand as a valid and subsisting security, and has allowed to the defendants a contribution in respect of it, the amount of which as contribution, is not complained of; that is to say, the defendants do not complain of the mode of calculation of the contribution if the case is treated as one for contribution only.

Under such circumstances, and in the view that I take as to the right of the parties under the contract sued on, I do not see that I am called upon to determine or decide upon the question as to whether or not the resolution adopted and passed by the council of the plaintiffs had the effect of releasing and discharging Durand from his obligation upon his bond, and it being unnecessary, it is better I think I should not decide this question.

Then as to the appropriation of the \$12,000. Mrs. Brown was the executrix of the late John Brown. As I understand from statements of counsel, in which they do not differ, an arrangement was made between her and the

plaintiffs whereby a trustee (who became and is an officer of the plaintiffs) was appointed, to whom certain of Mr. Brown's properties were handed over for realization and application of the moneys arising therefrom towards satisfaction of Mr. Brown's defalcations, without any indication of any kind as to what part or portion of such defalcation or liability the money when realized should be applied.

The trustee having realized the money, being an officer (Treasurer I think) of the plaintiffs, for and on behalf of the plaintiffs, applied the money so far as the same would extend towards satisfaction of the earlier of the liabilities by reason of the defalcations. This seems to me to be in the position of a payment of a small sum by a debtor to his creditor, to whom he owed several sums larger in amount, which had fallen due at various times, long past, without making any appropriation of the sum so paid. So far as the immediate point in contention is concerned, I fail to distinguish it from a payment of so much money made by the late Mr. Brown himself, on account, without making any appropriation of the payment; and surely in such a case the plaintiffs to whom the money would be paid would have the right to make the appropriation of the payment. I am of the opinion that on this question the contention of the defendants—the appellants, also fails.

I am therefore of opinion against the appellants as to the whole of the appeal, which I think should be dismissed with costs.

By agreement the case was also heard on further directions. The only question raised on further directions was as to the time from which the interest on the amount to be paid by the defendants should be computed. The plaintiffs claimed interest from three months after the proofs of loss, and they fix this period the 16th day of May, 1883. The contention against this was that the amount to be paid by the defendants was not then ascertained and could not for this reason be paid by the defendants, and that it had only been ascertained by the termination of this action. I do not think this a good

answer to the claim made for the interest. The defendants have had in their hands, and have had the benefit of, the sum now ascertained to have been and to be owing to the plaintiffs. The money was payable by virtue of the defendants' deed, and I think the interest should be allowed.

The order will be for the payment by the defendants to the plaintiffs of the sum of \$5279.84 and interest thereon from the 16th day of May, 1883.

As I understood counsel, the costs of the action and of the reference were reserved. The defendants will pay to the plaintiffs their costs of the action and of the reference, and, as I have before said, the costs of this appeal are to added to the sum aforesaid.

Judgment accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

MASON V. MASON.

Devolution of Estates Act—Locke King's Act—Will—Mortgaged land—
49 Vic. ch. 22—R. S. O. ch. 106, secs. 36, 37.

The Devolution of Estates Act, 49 Vict. ch. 22, has not superseded, but is to be read in conjunction with R. S. O. ch. 106, secs. 36, 37, and mortgaged land devised by will is primarily liable to pay its own burdens, unless the will otherwise directs by such terms as distinctly and unmistakably refer to or describe the mortgage debts.

Held, that the fact that of two lots owned by the testator, subject to encumbrances, he devised one to his son D., while the other passed under a general devise to the executors in trust for the heirs-at-law, afforded no indication of intention that D. should enjoy free from the mortgage debt, nor did the fact that the testator directed his debts to be paid out of a mixed fund.

MOTION for judgment in an action by the executors of David Mason for the construction of his will.

The will contained a general devise of all the testator's property real and personal, to the executors upon trust for payment of debts, &c., and to permit the widow to occupy and receive the profits of the same during her widowhood, and until their youngest child should attain the age of twenty-one. There was then a direction to the executors to convey a specified lot of land to the testator's son David, upon his attaining twenty-one years, but no disposition of the residue of his estate after the termination of the widow's interest. The lot devised to David was the only land which the testator had at the time the will was made but he afterwards acquired another lot, which passed under the general devise to the executors for the benefit of the heirs-at-law. Both lots were encumbered at the time of his decease. There was no reference in the will to the encumbrance upon David's lot.

On the matter coming up by way of motion for judgment on February 16th, 1887, before Boyd, C., a contention arose as to whether David took free from or subject to the mortgage debt, it being contended on his behalf that 49 Vic. ch. 22, (O.) had superseded R. S. O. ch. 106, sec. 36, having for purposes of administration turned undisposed of realty into personalty.

Donovan, for the plaintiffs.

Miller, Q. C., for the widow.

J. MacLennan, Q. C., for the infant, David Mason.

Moss, Q. C., *W. Davidson* and *J. Hoskin*, Q. C., for other parties.

March 5th. 1887. *BOYD*, C.—According to R. S. O. ch. 106, sec. 36, the land mortgaged is primarily liable to pay its own burdens, and according to sec. 37, if a testator wishes to vary this rule, it must be by a direction applying to his mortgage debts in such terms as distinctly and unmistakeably to refer to or describe them: *Nelson v. Page*, L. R. 7 Eq. 25. There is no reference of such a kind to mortgage debts in this will. The fact that there is a specific devise of one lot to David, while the other lot passes under a general devise to the executors in trust for the heirs-at-law, affords no indication of intention that David is to enjoy free of the mortgage debt. Nor is such an indication to be gathered from the fact that he directs his debts to be paid out of a mixed fund: *Elliot v. Dearsley*, 16 Ch. D., 328; *Re Smith*, 33 Ch. D. 198; *Re Newmarch, Newmarch v. Storr*, 9 Ch. D. 12.

The Devolution of Estates Act, 49 Vic. ch. 22 (O.), is to be read in conjunction with the sections above cited from the R. S. O. c. 106. And in that view, I do not think that the words used in the 4th and 7th sections relating "to the payment of debts," apply to the payment of such debts as are charged on land, and by the terms of the R. S. O. are payable thereout as the primary fund.

My judgment is, therefore, that the land devised to David, is not exonerated from contributing to pay its proper share of the mortgage created by the testator.

Costs out of estate.

A. H. F. L.

[CHANCERY DIVISION]

RE HAGUE, TRADERS BANK V. MURRAY.

Judgment against executor—Effect as against other creditors—Conclusive evidence of indebtedness—Promissory note—Notice of dishonour—Administration of goods and lands.

A judgment obtained against an executor upon a debt of the deceased, is conclusive evidence of the indebtedness to the plaintiff as against all other creditors of the deceased, and is so in administration proceedings, though the administration is of goods and lands. Therefore where a judgment had been obtained against the executor of H. on certain promissory notes endorsed by him and maturing after his death, and upon H.'s estate afterwards being administered by the Court, the judgment creditor brought the judgment into the Master's office and claimed upon it, and other creditors of H., thereupon asked to be allowed to adduce evidence as against the claim on the ground that no proper notice of dishonour had been sent by the holder of the promissory notes, upon which the judgment had been obtained.

Held, reversing the decision of the Master in Ordinary, that they could not be permitted to do so.

Seem, such a judgment is only *prima facie* evidence as against heirs-at-law, and devisees of the deceased.

Eccles v. Lowry, 23 Gr. 167, commented on.

THIS was an appeal from the certificate of the ruling of the Master in Ordinary, in respect to a question which arose in his office in the course of the administration there of the real and personal estate of William Hague, deceased.

Amongst those who filed claims in the Master's office as creditors of William Hague was the Central Bank, who had prior to the administration order obtained judgment, by application under O. J. A. r. 80, against Thomas Murray, executor of William Hague, in respect of certain promissory notes which had been endorsed by William Hague, and which matured after his death, and were dishonoured. The Central Bank brought in their judgment into the Master's office, and upon counsel for certain other creditors expressing a desire to be allowed to adduce evidence before the Master to shew that no proper and sufficient notice of dishonour had been sent by the Bank, as holder of the said notes, to the executor of William Hague, and that therefore all claim in respect to the said notes was gone; counsel for the bank urged that they could not be allowed

to do so, as the judgment was as against such other creditors final and conclusive evidence of the debt due from the estate of William Hague, in the absence of fraud, collusion, or mistake, and they also urged that in any event the judgment was conclusive in the Master's office.

The certificate of the ruling of the Master is set out below in the judgment.

The motion for the administration order was originally returnable in June, 1886, but stood enlarged until December following, when the order was made for the administration of the real and personal estate.

As stated in the judgment below, the judgment of the Central Bank was obtained in the interval.

The Traders Bank of Canada were the plaintiffs in the administration proceedings, and at the time of making the motion for administration claimed to be creditors in respect to certain other promissory notes endorsed by Hague, and which similarly matured after his death, and were dishonoured.

While the motion stood enlarged, however, between June and December, 1886, they also entered suit against the executor on the notes, and obtained judgment, by application under O. J. A., r. 80, in the same way and at about the same time as the Central Bank.

It having been intimated to the Master in Ordinary that the Traders Bank intended to adduce before him a judgment similar to that of the Central Bank, the one point of difference being that the Traders Bank were the parties who obtained the administration order, he suggested that the Traders Bank should be represented on the appeal, which it was intimated the Central Bank intended to take from his ruling in the case of their judgment.

The grounds on which this appeal was based are sufficiently indicated in the judgment for the purposes of this report, though it may be added that objection was also taken in them to the Master's jurisdiction in any event to adjudicate on any impeachment of the judgments in

his office. From the view taken by the learned Judge, however, it was not necessary to deal with this issue.

The appeal came up for argument on February 28th, 1887.

S. H. Blake, Q.C., and *A. H. F. Lefroy*, for the bank, in support of their judgments, cited *Wells* on Res Adjudicata, s. 177; *Will.* on Exec., 7th ed. p. 1770, 1804; *Lewis v. Rumney*, L. R. 4 Eq. 451; *Castelaw v. Guilmartin*, 54 Geo. 299; *Freeman* on Judgments, 3rd ed. 163; *Bigelow* on Frauds, p. 170, 175; *Lewis v. Rogers*, 16 Penn. at p. 21; *Sidensparker v. Sidensparker*, 52 Maine, 481; *Candee v. Lord*, 2 Comst. 275; *Kerr* on Frauds, 2nd ed. p. 399; *Martin v. Boulanger*, 8 App. Cas. 296; *Eccles v. Lowry*, 23 Gr. 167; *Ex parte Kibble*, L. R. 10 Ch. at p. 378; *McDonald v. Boice*, 12 Gr. 48; and they also called the attention of the Judge to *Irhodes v. Seymour*, 36 Conn. 1, which, however, they contended was out of accord with the weight of American authority. On the question of jurisdiction of the Master, they referred to *Hunter v. Baxter*, 3 Giff. 214; *McDougall v. Lindsay Paper Mill Co.*, 10 P. R. 247; *Bickford v. Grand Junction R. W. Co.*, 1 S. C. R. 696, 725.

J. Reeve, for the creditors, seeking to impeach the judgments *contra*, cited *Harvey v. Wilde*, L. R. 14 Eq. 438; *Lovell v. Gibson*, 19 Gr. 280; *Willis v. Willis*, *ib.* 573, as to the effect of the judgments; and *Merchants Bank v. Monteith*, 10 P. R. 459, as to the jurisdiction of the Master.

March 16th, 1887. FERGUSON, J.—The estate of the late William Hague is being administered in the Master's office. A memorandum of the will of the late Mr. Hague, which was used on the argument before me, is as follows:

"I give, devise, and bequeath all the estate, real and personal, of which I may die possessed or entitled, to Thomas Murray and John Garton, both of the city of Toronto, to hold on trust for me, that is to say:

"1. To pay all my just debts, funeral and testamentary expenses."

"2. To pay the wife Mary Ann Hague, if surviving, during widowhood, \$3 a week in full satisfaction of all claim for dower."

"3. To divide the rest and residue of the estate amongst the children share and share alike."

John Garton renounced probate and Thomas Murray is the sole executor, he having duly proved the will.

On the 13th of September last the Central Bank recovered a judgment in the Common Pleas Division of the Court against Murray, the executor, for \$2230.46, and \$38.73 costs of suit. This judgment was upon a claim against the testator in respect of certain promissory notes. It was stated on the argument that this judgment was obtained under the provisions of rule 80 of the Judicature Act. Writs of execution upon the judgment were duly placed in the hands of the sheriff to be executed. These writs were withdrawn in the month of November last, at the request of the solicitors for the estate, and on the faith of a letter received from them, which contained an undertaking that the Central Bank should be allowed to add their costs of the action to their claim and rank on the estate for the whole.

In the proceedings in the administration in the Master's office, the Central Bank, in proving their claim against the estate, produced the record of the above-mentioned judgment as proof of a claim to the amount thereof. This was not objected to as not being evidence and was received, but counsel on behalf of other creditors of the late Mr. Hague raised a question by contending that this judgment was only *prima facie* evidence of the debt as against these other creditors in the administration proceedings; these other creditors seeking to give evidence tending to show that the alleged indebtedness or claim, for which the judgment was recovered, did not exist in reality as a good and legal demand, which should be satisfied out of the estate to the prejudice of, or as against the other creditors.

As counsel for these other creditors stated the matter before me, these other creditors did not seek to impeach the judgment as a judgment at all, but only to attack the claim for which it was recovered on the ground that it was on notes on which the late Mr. Hague was endorser only, and that there was no proper notice of dishonor of the notes, and, on the further ground that the claim was against Hague as a member of the firm of Vale & Co. On this contention before him, the learned Master ruled and issued the certificate from which this appeal is, and which is as follows :

" I do hereby certify that the claim of the Central Bank of Canada did this day come up before me for adjudication in these proceedings as against the estate of William Hague, deceased, herein being administered, and that the Central Bank of Canada put in proof of having prior to the administration proceedings obtained a judgment against the defendant, Thomas Murray, being executor and devisee in trust for payment of debts under the will of William Hague, the said judgment having been obtained by them in respect of certain promissory notes ; and that counsel for the other creditors thereupon desired to be allowed to give evidence that the notes upon which the said judgment was obtained had been when they matured dishonored, and protested for non-payment ; and that no notice, or no sufficient notice of the dishonor of the said notes was sent by the holder thereof to the said William Hague, or to his executor, in respect of such notes. Whereupon I ruled that the said other creditors had a right to give evidence against the *prima facie* case made by the Central Bank of Canada by the production of the said judgment, and to show that such judgment was not founded upon a claim properly chargeable against the testator's estate, or if chargeable, then chargeable only against the alleged partnership interest of the testator in the firm of Vale & Co."

For the appellants, it was contended that the judgment is conclusive evidence in their favor against the other creditors ; and for these other creditors the contention was

that the judgment is only *prima facie* evidence against them.

The appellants do not seek any priority over the other creditors by reason of having the judgment. They say that the debts are to be paid *pari passu*, according to the statute, and to this they submit. They only say that their judgment proves the relationship of debtor and creditor, and the amount of the debt owing to them, and that these, the other creditors, cannot be permitted to controvert.

In support of their contention, the appellants referred to a large number of American cases and books, as well as to many English and Canadian cases.

Counsel for the respondent relied upon a number of cases, most of which are amongst the authorities referred to in the case *Eccles v. Lowry*, 23 Grant, 167.

The question discussed upon the rehearing in that case was, as stated in the judgment of Mr. Justice Proudfoot, whether a judgment recovered at law upon a covenant against the administrator of an intestate, is *prima facie* evidence against the heir-at-law, of whom the administrator was one.

In delivering his judgment, one of the learned Judges said, at p. 170: "I am of the opinion that the proper rule to lay down is that while such a judgment is, in the absence of fraud or mistake, conclusive against the personal representative and the personalty, it is *prima facie* evidence against the heirs-at-law."

Another of the learned Judges said, at p. 172: "The executor represents the estate of the deceased. It is his duty to protect it from demands that may be made upon it, and when judgment is recovered against him, the lands may be sold under it. It is true, the estate descends to the heir or devisee, &c. The judgment is as against the estate conclusive evidence of the existence of the debt."

The headnote of the case, so far as it has any bearing here, is: "*Where an action is brought against the personal representative of a testator or intestate, the estate, as an estate, is bound by the result of the action brought, just as*

the deceased would have been bound if in his lifetime it had been prosecuted against himself; and the judgment stands at law as conclusive against all the property of the deceased, whether it be ultimately realized out of the goods or lands; as against the heirs, however, it is only prima facie evidence."

It was conceded that there was no fraud or collusion in recovering the judgment relied upon in the present case, nor was there any error or mistake; the question is simply as to the force of the judgment as a piece of evidence.

Lest it might be considered that the question for decision in *Eccles v. Lowry* was not the precise question before me, I have gone with, I think, much care through all the authorities that were referred to—and I may say many others—and I am of the opinion that what they show is that a judgment, such as the judgment in the present case, is conclusive evidence against the creditors of the estate, but that it is only *prima facie* evidence against the heirs-at-law. I think the rule stated by Vice-Chancellor Blake in *Eccles v. Lowry*, is shewn by the authorities to be quite correct, so far as it goes, and I think the books and cases shew further that the judgment is binding upon and conclusive evidence against the other creditors in administration proceedings, though the administration be of goods and lands. I think the judgment is, as against these respondents who are creditors only, conclusive evidence of the relationship of debtor and creditor, and of the amount of the debt, and that the ruling of the learned Master was erroneous.

As to any difference that may be thought to exist in respect to what has been called its "uncontrollable verity" between a judgment obtained by default of the defendant, and one actually pronounced or delivered by the Court after contention or contestation, the case *Huffer v. Allen*, L. R. 2 Ex. 15 may be looked at.

The appeal should, I think, be allowed with costs.

It was stated at the bar, (and I find a memorandum of agreement in respect to it on the margin of the brief

handed in), that the case of the claim of the Traders Bank in this administration is, in point of facts, the same as the present case, and that the judgment on this appeal should govern in respect of that claim, as well as the claim of the present appellants, and under such circumstances the judgment may be applied to that claim.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

REGINA V. BRADFORD.

Canada Temperance Act, 1878, secs. 2, 103—Police magistrate—Jurisdiction.

The Town of Paris is an incorporated town wholly within the county of Brant. The defendant was convicted before a police magistrate, whose commission was for the county of Brant, exclusive of the city of Brantford, for that she did at the town of Paris, in said county of Brant, unlawfully sell intoxicating liquor contrary to the Canada Temperance Act, 1878.

Held, that said magistrate was not, within the meaning of sec. 103 of the Canada Temperance Act, 1878, a police magistrate for the town of Paris, and that the town of Paris could not, by virtue of the said commission appointing a police magistrate for the county of Brant, be held to be a town having a police magistrate.

Regina v. Young, 13 O. R. 198, followed.

The defendant was, at the city of Brantford, in the county of Brant, convicted before James Grace, police magistrate for the county of Brant, exclusive of the city of Brantford, for that she did, on the 21st day of December, 1886, at the town of Paris, in the said county of Brant, being a place wherein the second part of the Canada Temperance Act then was in force, unlawfully sell intoxicating liquor contrary to the said Act.

This conviction, together with the information, depositions, evidence, and proceedings, had and taken before the police magistrate on the said charge, was removed into this Court by writ of *certiorari*, and it was shewn by affidavit that the said James Grace, the police magistrate before whom the said conviction was made, was not otherwise a police magistrate than under and in virtue of a commission appointing him police magistrate for the county of Brant, exclusive of the city of Brantford, and that there was no police magistrate for the town of Paris as distinct from the county of Brant.

On filing the writ of *certiorari* and return, with the papers returned therewith, and affidavit as above mentioned, *Aylesworth*, for the defendant, obtained an order *nisi* calling upon the said police magistrate and the prose-

ctor to shew cause why the said conviction should not be quashed, upon the ground, among others, that the evidence and conviction shewed the offence therein mentioned to have been committed in the town of Paris, a town not having a police magistrate, and the said police magistrate had, therefore, no jurisdiction to entertain the said prosecution or make the said conviction.

On 7th of June following *Aylesworth* supported the order *nisi*.

Delamere shewed cause, contending that in view of the definition of the word "county," by the second section of the Canada Temperance Act, 1878, and the fact that the authority of this police magistrate extended to every part of the county of Brant and was co-extensive with the territorial limits of the county, he had jurisdiction to hear cases arising in Paris. He urged that the case of *Regina v. Young*, 13 O. R. 198, was distinguishable, because there the police magistrate, not being a police magistrate for the whole county of Lanark, had, under section 103 of the Canada Temperance Act, 1878, no jurisdiction in any part of Lanark county, so far as trying offences against that statute was concerned, whilst here Mr. Grace had unquestionably jurisdiction to try offences against that Act, no matter where in the surrounding county committed, unless, as was contended by the defendant, within incorporated towns in the county.

June 9, 1887. O'CONNOR, J.—The interpretation of the word "county" in section 2 of the Canada Temperance Act, 1878, (and which is imported into and is part of section 2 of chapter 106 of the Revised Statutes of Canada, without substantial alteration) is consistent with all that part of the clause of section 103, having reference to the Province of Ontario, which ends with the expression, "Then before such Police Magistrate, or, in his absence, then before the Mayor, or any two Justices of the Peace;" and if the clause ended there I should without hesitation say a Po-

lice Magistrate for a county would have jurisdiction over and could take cognizance of any offence under the Act committed in a town within the territorial limits of that county. The clause does not, however, end there, but proceeds: "Or, if the offence was committed in any city or town not having a Police Magistrate, then before the Mayor thereof, or before any two Justices of the Peace."

This last provision seems to me to exclude cities and towns from the operation of the previous part of the clause in question, notwithstanding the meaning of the word "county," as interpreted by section 2 of the Act.

I, therefore, distinctly and fully adopt the construction and interpretation of sections 2 and 103 of the Act as expressed by the learned Chief Justice of the Queen's Bench Division in the case of *Regina v. Young*, 13 O. R. 198, at pp. 200 and 201, in so far, at least, as the case now under consideration is concerned.

The offence in this case was alleged to have been committed in the town of Paris, in the county of Brant, and the case was tried before and the conviction made by "James Grace, Esq., Police Magistrate for the county of Brant, exclusive of the city of Brantford."

It follows, under the above interpretation, that the order *nisi* must be made absolute to quash the conviction; but, as the conviction was made before the publication of the decision in *Regina v. Young*, it will be quashed without costs, and with the usual order to protect the magistrate.

The following cases, viz.: *Regina v. Bradford*, a second conviction, *Regina v. Metcalfe*, and *Regina v. Ealand*, to each of which the same objection applies, as well as to the case particularly disposed of, counsel agreed should follow the result of the decision in one case. The rule will, therefore, be made absolute, in each of these three cases lastly named, to quash the conviction in each without costs, and with the order to protect the magistrate.

Judgment accordingly.

[CHANCERY DIVISION.]

THE INCORPORATED SYNOD OF THE DIOCESE OF TORONTO
V. LEWIS ET AL.

St. James's Rectory, Toronto—Imperial Stat. 31 Geo. III., ch. 31, sec. 38—Endowment of rectory with lands—City rectory—Township rectory—Sale of lands under 29 & 30 Vic. ch. 16—Distribution under 41 Vic. ch. 69, (O.)—City incumbents—Township incumbents—Who entitled to participate.

The Church of St. James was erected into a rectory "at the city of Toronto within the said township, (York)" by patent under 31 Geo. III. ch. 31, sec. 38, in 1836, and was endowed at different times with lands situate some in the city of Toronto, and some in the township of York.

When the lands were sold under 29 & 30 Vic. ch. 16, and the proceeds had to be distributed by the Synod of Toronto under 41 Vic. ch. 69, there were Incumbents of parishes in the city of Toronto and in the township of York, and it was contended that only the incumbents of the city parishes were entitled to participate in the distribution.

On a special case being stated for the opinion of the Court, it was

Held, that the city of Toronto was, for the purposes of the grant erecting the rectory to be considered as being within and a part of the territory of the township of York, and the grant was for the benefit of both the township and the city as one territory, and that the incumbents of the churches in the township, must, under 41 Vic. ch. 69, sec. 2, be included among the participants in the fund.

Semble, there would appear to have been no authority for the creation of a rectory in this Province other than a rectory for a township.

THIS was a special case stated for the opinion of the Court under the Ontario Judicature Act, 1881, between the Incorporated Synod of the Diocese of Toronto, as plaintiffs, and the Reverend Joshua Pitt Lewis, and eighteen other clergymen, incumbents of churches in the city of Toronto, as one set of defendants, and the Reverend T. W. Patterson, and three other clergymen, incumbents of churches in the Township of York, as another set of defendants.

It appeared that the parsonage or rectory of St. James was erected by Royal Patent (set out in the judgment) in the year 1836, as "a parsonage or rectory at the city of Toronto, within the said township (York) * * * designated as 'the First Parsonage or Rectory within the said township of York,'" and received lands situated in the township of York under such patent, and lands situated in the city of Toronto from other sources, as endowments

When these lands became valuable and were in part sold under 29 & 30 Vic. ch. 16, and the income of the proceeds had to be distributed on the death of the then Rector, under the provisions of 41 Vic. ch. 69 (O.), there were nineteen clergymen (the first set of defendants above mentioned) who were incumbents of churches in the city of Toronto, and four clergymen (the second set of defendants above mentioned), who were incumbents of churches in the township of York, and questions arose as to whether both city and township clergymen were entitled to participate, or what were their respective rights in the respective lands.

The questions submitted by the special case, were :

(1). Whether the Incumbents of all the said churches including those in the township of York and without the city of Toronto are beneficiaries under the trusts of the said Acts, or whether the city Incumbents alone are such beneficiaries ?

(2). Whether the township Incumbents are entitled exclusively to participate in the lands situate in the township of York, and the income and proceeds thereof, and the income of the proceeds of the portions sold ; and

(3). If they are, what proportion of the salary of the Rector of St. James should be paid out of the city and township lands respectively ?

The case was argued on March 12 and 14, 1887, before Ferguson, J.

Moss, Q. C., stated the case shortly for the plaintiffs, and then proceeded : My clients are in the position of *quasi* trustees or stakeholders, and they bring the case before the Court for an opinion as to who are entitled to participate in the fund.

Robinson, Q. C., for the township Incumbents. The township Incumbents are entitled to participate in the fund. The Imperial Statute 31 Geo. III., c. 31, ss. 38 and 39, authorized the constitution or erection of rectories in

any *Township* or *Parish*. Upper Canada was at that time divided into Townships, and Lower Canada into Parishes: *Attorney-General v. Grasett*, 5 Gr. 412, and 6 Gr. 200. For the definition of "Rectory," see the latter. The duties of the Rector of St. James's extended to the city of Toronto and the township of York. The patent creating St. James's Rectory speaks of "the spiritual welfare of *all* our loving subjects resident within the township of York," &c. On the same day that St. James's was created a Rectory, St. John's Rectory was erected as "The Second Rectory in the township of York," and the same recitals, &c., were in the patent, so that both these rectories are on the same footing. The Act of 1866, 29 & 30 Vic. c. 16, gave the Synod power to sell, pay costs, pay incumbent Rector, and then to distribute amongst the incumbents of Churches in cities, towns, and townships in which the lands were situate, or to which the rectory belonged. That evidently meant the township of York. City, town, or township means place. Then 39 Vic. c. 109 (O.), relating to the Diocese of Ontario, was passed, and section 4, after referring to the Kingston and Belleville rectories, proceeds, "and as to the rectories in *other townships*." Townships were not before referred to, so "township" means original division into townships. Thus the *city* of Kingston and the *town* of Belleville are treated as townships. Then 41 Vic. c. 69 (O.), was passed. The preamble shews no desire for any change. The amount payable to the rectory of St. James is fixed with no power to the Synod to reduce it, and the surplus is to be distributed. Any such change as is contended for by the city rectors would take the whole original benefit from the township rectors, and no such change could be made without very plain language, which does not appear here. I refer to *Re Goodhue*, 19 Gr. 366, *Salmon v. Duncombe*, 11 App. Cas. 627.

McMichael, Q.C., on same side. The whole legislation and surrounding circumstances must be looked at. Provision was made for the spiritual welfare of the colonists in townships or parishes. In the year 1836, fifty-eight recto-

ries were erected. The two for the township of York, St. James's and St. John's, were conterminous. The patent must be liberally interpreted. The church building was in the city of Toronto, but was for the township of York. If the city of Toronto chose to separate itself from the township of York, the city was not entitled to participate in the benefit of the patent covering only township lands. The question now to be disposed of is, What is to become of the surplus? The answer is, it is to be applied to the spiritual welfare of the inhabitants of the township of York without reference to the Incumbents personally. Why should the city Incumbents separate themselves from the township, and relieve themselves of all duty and responsibility in respect thereto, but quietly keep all the funds properly applicable to provide such duty? The effect of the patent was to constitute a parish co-extensive with the township of York in accordance with the statute 31 Geo. 3, ch. 31, sec. 38; per Blake, C., *Attorney-General v. Grasett*, 5 Gr. at 431. The grant was made for the benefit of all the members of the Church of England in the township of York: *ib.* p. 433. The township Incumbents have two claims to participate in the fund, while the city Incumbents have only one under the wording of sec. 3 of 29 & 30 Vic. ch. 16, where it says: "In which said lands are situate or to which such rectory belonged."

When sec. 2 of 41 Vic. ch. 69 (O.), is read so far as it applies to St. James's rectory, it provides that the excess is to be distributed among the incumbents of churches in the city, and churches in the townships. The township being the place in which the lands are situate, and being the place to which the rectory belongs.

J. MacLennan, Q.C., for the city Incumbents. The Imperial Statute, 31 Geo. 3, authorized the erection of rectories, and it intended that they should be the same as rectories in England. A rectory is defined by Sir John Robinson, C.J., in *Attorney-General v. Grasett*, 6 Gr. 234. The Church of St. James was organized in 1808, and it was subsequently erected into a statutory rectory. Previous

to its being so made such a rectory, a grant of land was made to it "for the parishioners of the town of York." A rectory was thus created with all its incidents in the town of York, all the endowments given up to the year 1825 were lands in the city of Toronto, and a large proportion of the lands producing the fund in dispute were given to St. James's Church. St. James's is not a township church at all, but a city church. The patents before 1834 speak of parishioners, so there must have been a parish, and that parish was St. James's in the city. St. James's was a rectory before the patent creating it as such was issued, and that patent was only issued so that the land grant therein contained could be made to it. The Act incorporating the city substituted "city of Toronto" for "town of York," so that all the patents should now be read as if the city of Toronto was mentioned in them. The city of Toronto is not within the township of York. It is separate and distinct, and was so laid out. The patents shew that the church and burying ground are vested in the clergyman as trustee for the parishioners, but the glebe is for the rector, and the parishioners have nothing to do with it. The Act of 1836 applies to the whole fifty-eight rectories. *Parish* and *township* are not synonymous under the original statute. It says *parish* or *township*. St. James's is a *city* rectory, and St. John's a *township* rectory. Under the statute of 1866, the city incumbents should take the city lands, and the township incumbents the township lands, but under 41 Vic. c. 69 (O.), it is only the surplus, after the St. James's salary, \$5,000, is paid, that is to be distributed, and the township incumbents should have their proportion of that. The Act of 1866 allows St. James's Rector to get all the rents of the unsold lands, and \$3,000 a year. And the Ontario Statute of 1878 provides for city rectors, town rectors, and township rectors. "Such other places" in sec. 2 means places above referred to. The state of affairs in 1866, when there were city, town, and township rectors, must be considered. St. James's was then a city rectory. The language shews that St. James's surplus was to go to

the city rectors only. I refer to *Roe v. Tranmarr*, 2 Smith's L. C. 8th ed., 539; *Dwarris* on Statutes, 2nd ed., 550, 578, 579, 612, 613; *Laird v. Briggs*, 19 Ch. D. 22; *Roddy v. Fitzgerald*, 6 H. L. 823, 827; *Elphinstone, Norton and Clark*, on the Construction of Deeds, 78 *et seq.*

March 30, 1887. FERGUSON, J.—The matters in contention come before me in the form of a special case stated under the provisions of the Judicature Act. The plaintiffs occupy a position somewhat analogous to that of a plaintiff in an interpleader action. Moneys have come, and will hereafter come into their hands belonging to the defendants, or some of them, and they (the plaintiffs) desire to have the opinion of the Court as to the way or manner in which these money should be divided or distributed amongst the defendants.

The defendants are composed of two classes. One class being nineteen clergymen who are Incumbents of respective churches of the Church of England within the limits of the city of Toronto, as the city is at the present time; the other class of defendants being Incumbents respectively of churches of the Church of England within the limits of the township of York. The difficulty has arisen in respect of the proper division or distribution of a certain excess of interest arising from the proceeds of sales of certain rectory lands under and in pursuance of the provisions of the statute 29 & 30 Vic. ch. 16, and of the rents, issues, and profits of lands remaining unsold—this excess being the excess mentioned and referred to in the Act 41 Vic. ch. 69, sec. 2 (O.) Some of these lands are situate within the limits of the city of Toronto, and some of them are within the limits of the township of York. The defendants who are Incumbents of churches in the city of Toronto, contend that they are entitled to have distributed amongst them the whole of this excess to the exclusion of the Incumbents of churches in the township. The defendants, Incumbents of churches in the township, contend that they are entitled

to participate in the division or distribution of this excess or surplus, or that they are entitled to the income derived from the unsold portions of the lands situate in the township, and from the proceeds of the sales of the portions thereof that have been sold. The plaintiffs, who are trustees in respect of the funds, say that they are unable to decide whether they are at liberty to assign a portion of the said excess or surplus to the township Incumbents, or not, and if so, in what manner. This fund to be distributed is very considerable, amounting to \$15,000 per annum, or thereabouts. The questions stated for opinion, are:

1. Whether the Incumbents of all the said churches, including those in the township of York, and without the city of Toronto, are beneficiaries under the trusts of the said Acts, or whether the city Incumbents alone are such beneficiaries?

2. Whether the township Incumbents are entitled exclusively to participate in the lands situate in the township of York, and the income and proceeds thereof, and the income of the proceeds of the portions sold; and

3. If they are, what proportion of the salary of the Rector of St. James should be paid out of the city and township lands respectively?

This salary of the Rector of St. James, as will be seen by reference to the Provincial Act before referred to, is \$5,000 per annum, and the Act provides that it may not be diminished.

The case presented sets forth in a manner somewhat historical, and with comparative fullness, various acts that have been done, and by reference various statutes that have been passed relating to the lands in question, the statutes relating, of course, to other lands as well. It is, however, necessary that I should refer to these only so far as they bear upon or affect the questions that I have now to answer or determine, and for the purposes of the present case I think I need not refer at any length to the grants or conveyances of the lands in the city of Toronto prior to the grant creating the rectory of St. James, in the year 1836, for reasons that will hereafter appear.

The authority for constituting parsonages or rectories in this country is contained in the Imperial Act 31 Geo. 3, ch. 31, which also authorizes the endowment of the same. That Act, it is scarcely necessary to say here, applied to both the provinces of Upper Canada and Lower Canada. The 38th section enacted, amongst other things, as follows :

“ That it shall and may be lawful for His Majesty, his heirs or successors, to authorize the Governor or Lieutenant Governor of each of the said provinces respectively, or the person administering the Government therein, from time to time, with the advice of such executive council as shall have been appointed by His Majesty, his heirs or successors, within such province, for the affairs thereof, to constitute and elect, within every township or parish which now is, or hereafter may be formed, constituted, or erected within such province, one or more parsonage or rectory, or parsonages or rectories, according to the establishment of the Church of England, and, from time to time, by an instrument under the great seal of such province, to endow every such parsonage or rectory with so much, or such part of the lands so allotted and appropriated as aforesaid, in respect of any lands, within such township or parish, which shall have been granted subsequently to the commencement of this Act, or of such lands as may have been allotted and appropriated for the same purpose, by or in virtue of any instruction which may be given by His Majesty, in respect of any lands granted by His Majesty before the commencement of this Act, as such Governor, Lieutenant Governor, or person administering the Government, shall, with the advice of the said executive council judge to be expedient under the then existing circumstances of such township or parish.”

What is meant by the expression in this section, “ of the lands so allotted and appropriated as aforesaid,” is seen by a reference to the 36th section of the Act. No question, however, on which this has a bearing, is raised here. Section 39 of the same Act provides for the presentation to every such parsonage or rectory of an Incumbent or Min-

ister of the Church of England, and that the person so presented should hold and enjoy the same, and all the rights, profits, and emoluments thereunto belonging or granted as fully and amply, and in the same manner and on the same terms and conditions, and liable to the performance of the same duties as the Incumbent of a Parsonage or Rectory in England.

In this Act the words "Township" and "Parish" seem to be used as synonymous terms. This is remarked on in the case *Attorney-General v. Grasett*, 5 Gr. 412, and 6 Gr. 200, where it is also said the parish is co-extensive with the township, and it is there suggested that the use of the word "Township" had reference to Upper Canada, and the use of the word "Parish" to Lower Canada, the former being divided, or partly divided into townships, and the latter containing parishes instead.

There does not in or by the Act, so far as I can perceive, appear to be any authority for the creation, constitution, or erection of parsonages or rectories other than those "within townships or parishes" and if in Upper Canada townships and parishes are co-extensive, or township and parish are used in the Act as synonymous terms, or if the word "Township" is the word applicable in Upper Canada, and the word "Parish" the word applicable in Lower Canada, there would seem to be no authority for the constitution and erection of a rectory in Upper Canada other than a rectory within a township which being freely, and I think accurately read, would mean and be a rectory for a township, or a rectory belonging to a township.

This Act 31 Geo. III. ch. 31, is entitled "An Act to repeal certain parts of an Act, passed in the fourteenth year of His Majesty's reign, intituled *An Act for making more effectual provision for the Government of the Province of Quebec in North America*; and to make further provision for the Government of the said Province."

At the time of the grant or patent erecting and constituting the Parsonage or Rectory of St. James at the city of Toronto, within the township of York, many other

rectories in Upper Canada were erected and constituted, and it is apparent that the actors were careful and precise in following the authority for doing what they did. This grant is in the words following, namely :

“ PROVINCE OF UPPER CANADA.

“ *WILLIAM THE FOURTH, by the Grace of GOD, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith.*

“(Sd.) J. COLBORNE.

“WHEREAS His late Majesty King George the Third by letters patent under the Great Seal of the Kingdom of Great Britain bearing date the twenty-eighth day of June in the thirty-third year of his said late Majesty's reign did erect, form, ordain, make and constitute the Provinces of Lower Canada and Upper Canada and their dependencies to be a Bishop's See according to the establishment of the Church of England, to be called, from thenceforth, the Bishopric of Quebec ;

AND WHEREAS, by a certain Act or Statute of the Parliament of Great Britain passed in the thirty-first year of the reign of His said late Majesty, entitled “ An Act to repeal certain parts of an Act passed in fourteenth year of His Majesty's reign entitled ‘ An Act for making more effectual provision for the Government of the Province of Quebec, in North America, and to make further provision for the Government of the said Province,” sundry provisions were made respecting the allotment and appropriation of land for the support and maintenance of a Protestant clergy within the said Provinces respectively, and it was among other things more especially enacted that it might and should be lawful for His Majesty, his heirs and successors, to authorize the Governor, Lieutenant-Governor, or person administering the Government of each of the said Provinces, respectively, with the advice and consent of His Majesty's Executive Council within the same, from time to time to constitute and erect in every township or parish which then was or thereafter might be formed, constituted,

or erected within such Province, one or more parsonage or rectory, or parsonages or rectories according to the establishment of the Church of England ;

AND WHEREAS we having due regard to the spiritual welfare of all our loving subjects, resident within the Township of York in the Home District, and being desirous of making a permanent provision for their instruction according to the Doctrine and Discipline of the Church of England, and also *for the support of a Protestant Clergyman* duly ordained according to the rites of the said church, have, pursuant to the provisions of the said recited Act and by and with the consent and advice of our Executive Council of our said Province of Upper Canada determined to erect and constitute, and by these presents by and with the advice and consent aforesaid, do erect and constitute a parsonage or rectory at the City of Toronto within the said Township, according to the Establishment of the said Church of England to be hereafter known styled and designated as "The First Parsonage or Rectory within the said Township of York" otherwise known as 'The Parsonage or Rectory of Saint James.

And by virtue of the same authority, and by and with the advice and consent of our said Executive Council, we do hereby command that there shall be from henceforth and forever set apart from and out of the lands which we now hold in our said Province, by virtue of our royal Prerogative, certain parcel or parcels of land situated in the said Township composed of Lots numbers six, nine and twenty-two in the Second Concession, and Lot number seventeen in the Third Concession from the Bay in the said Township of York, containing by admeasurement eight hundred acres of land, as a Glebe and endowment to be held appurtenant with the said Parsonage or Rectory, we intending and willing by virtue of our Royal Prerogative forthwith to present an Incumbent or Minister of the said Established Church of England to the said Parsonage so hereby erected and constituted as aforesaid, with its appurtenances, saving nevertheless to ourself the right of here-

after erecting and constituting one or more Parsonages or Rectories within the said Township.

GIVEN *under the Great Seal, &c.*, 16th January, 1836.

(Sd.) D. CAMERON.

(Sd.) J. C.

The words "for the support of a Protestant Clergyman," occur in this grant. The Act 37 Geo. III. ch. 14, after reciting that a clerical error had crept into a few of the deeds given by the Crown by the insertion of the word "Clergyman" instead of the word "Clergy," provided that wherever the word "Clergyman" shall or may occur in any one of His Majesty's letters patent, the same shall be read, taken, and understood to mean and signify "Clergy."

The grant erected and constituted a parsonage or rectory at the city of Toronto, within the township of York, to be thereafter known, styled, and designated as "The first Parsonage or Rectory within the said township of York," otherwise known as "The Parsonage or Rectory of St. James." It recites: "Whereas we having due regard to the spiritual welfare of all our loving subjects resident within the township of York * * and being desirous of making a permanent provision for their instruction according to the doctrine and discipline of the Church of England, and also for the support of a Protestant clergy," &c.

The Imperial Act authorized the erection and constitution of more rectories than one in a township, and by a grant bearing date the same day, another parsonage or rectory was in the same terms *mutatis mutandis* erected and constituted within the township of York, to be thereafter known, styled, and designated as "The second Parsonage or Rectory within the said township of York," and otherwise known as "The Church of St. John in Yonge Street."

By the grant constituting the rectory of St. James, the eight hundred acres of land in the township were set apart as a Glebe and Endowment to be held "appurtenant with" the same.

On the 10th day of February, 1841, the part of the lands now in question that are situate in the city of Toronto, were, by the trustees who had held them in trust, conveyed and transferred to the then Incumbent of the parsonage or rectory of St. James, and his successors, forever, as a corporation sole as part of the endowment of the said parsonage or rectory of St. James. I need not here refer to or discuss the earlier grants or conveyances of these lands, or any of them, for the case stated (and before me) virtually states, and counsel on the argument stated and admitted that at this point of time all the lands which, or the proceeds of which are now in question, were respective parts of the endowment of the rectory of St. James. The rectory of St. James then had all these lands as an endowment, and was the first rectory within the township of York. The Church, however, and some of the lands of the endowment were within the city of Toronto, and within that part of the city of Toronto that formerly constituted the Town of York. and counsel agreed in saying that as a fact the town of York was laid down by an original survey and not as is sometimes, if not often the case, the site of a town carved out of the original survey of a township. What were the exact limits of the city of Toronto on the 16th January, 1836, when this rectory was constituted, does not appear. This could, if necessary, be ascertained from books at which I have the right to look, but in the view which I take of the case it is not important.

The rectory of St. James was no doubt constituted the first rectory within the township of York. By the terms of the grant, however, this rectory was erected and constituted a parsonage or rectory "*at the city of Toronto within the said township,*" the city of Toronto being, as I think, and as was not only admitted, but contended for by counsel representing the defendants the Incumbents of churches in the township of York, treated for the purposes of the grant, and for the same purposes considered as being within and a part of the territory of the township of York; and looking at the matter in this way, the grant would be for the

benefit of both the township and the city. In one sense the city may be said to be in fact within the township, for the township bounds it on three sides, and if even only this fact were the reason for saying on the face of the grant that the city was within the township, I would still be of the opinion that according to a fair and liberal reading of the grant, that is, reading it with a liberality towards the city, the surrounding circumstances at the time of the grant, so far as they appear, being taken into consideration, the same conclusion is arrived at, namely : that the grant was for the benefit of the township and city as one territory. The authority given was to erect and constitute a parsonage or rectory, or more than one, within every township, &c. This rectory was constituted at the city of Toronto as the first parsonage or rectory within the township of York, and on the face of the grant the statement is made that the city is within the township, and the conclusion that I have above stated is the only one that I can arrive at on the subject.

The question here is, as already mentioned, in respect of the division or distribution of a certain excess of interest arising from the proceeds of sales, and of the rents, issues, and profits of unsold lands.

The Act for the sale of the rectory lands, after providing for the sale, and amongst other things, for certain payments out of the moneys arising therefrom, provides for a division or distribution of any excess of interest there might be. It is, however, silent as to any surplus arising from rents, issues, and profits of lands remaining unsold. The provision is in these words : "And any excess of interest, beyond such annual payments shall be apportioned to and divided among the Incumbents of the other churches of the said church in the city, town, or township, in which said lands are situate, or to which such rectory belonged, in such proportion as such Incorporated Synod, or Church Society, with the consent of such Synod, where not incorporated, shall by resolution, by-law, or canon, from time to time, order and direct."

This Act is 29 & 30 Vic. ch. 16. The part above quoted is the concluding part of section 3. The true construction of this part of the Act may indeed be very difficult to ascertain, the passage being looked at in the presence of existing facts and the provisions of former Acts and grants. For the purposes of this case, however, I think I am not, owing to the passing of the subsequent Act 41 Vic. ch. 69 (O.), entitled "An Act to amend the Synod and Rectory Sales Acts affecting the Diocese of Toronto," called upon to place a construction upon it. Some intervening Acts were on the argument referred to, but counsel finally thought them, (and I think rightly) unimportant to the determination of what is really in question here.

The second section of 41 Vic. ch. 69 (O.), is as follows : "No Incumbent of any Rectory in the Diocese of Toronto who may be inducted therein after the passing of this Act, shall receive out of the proceeds of such sales, invested as in the said Rectory Act last mentioned, a sum larger than will, together with the rents, issues, and profits of the lands of the said Rectory, of which he is Incumbent, then remaining unsold, amount to the sums following, that is to say : as to the rectory in St. James in the city of Toronto, a sum of five thousand dollars a year : as to the rectories in towns to the extent of two thousand dollars a year ; and in other places the sum of one thousand six hundred dollars a year ; provided that such Incorporated Synod may, from time to time, by resolution, by-law, or canon, alter or vary the aforesaid amounts, but so that the incumbent of the said rectory of St. James shall not receive less than the said sum of five thousand dollars a year ; and all and any excess of interest arising from the proceeds of such sales, and of the rents, issues, and profits of the lands of such rectory respectively remaining unsold beyond such annual payments aforesaid, shall be apportioned to and divided among the Incumbents of the other Churches of the Church of England in the said city, and such other places in which the lands belonging to such rectory are situate, or which to such rectory belong respectively, in such proportions as

such Incorporated Synod shall by resolution, by-law or canon from time to time order and direct."

This section seems to have been enacted for the purpose of affording the rule to govern in respect to the distribution of the funds, and it contains an exceptional provision in favor of the Incumbent of the rectory of St. James. As regards the Diocese of Toronto it supersedes the provision in that respect contained in the third section of 29 & 30 Vic. ch. 16. The section seems to me to be one upon which it is difficult to place a construction as to its whole meaning, with certainty of accuracy, when one looks at all the words employed by the Legislature, and the manner of their collocation in the enactment. Only one of the learned counsel before me professed to be able to construe the section with clearness, although on each side of the contention there were counsel (more than one) all of unquestioned ability and long experience. One way or method employed by this counsel was the adoption and application to the enactment of the rule of construction laid down upon authorities referred to in *Duarris* on Statutes, 2nd Eng. ed., 613, where it is said: "General words in an Act of Parliament are often, where the sense requires it, and in furtherance of the intention to be taken distributively, *reddendo singula singulis*. They are then applied to the subject matter to which they appear by the context most properly to relate, and to which they are really most applicable," and then reading the section so far as important here (only as it applies to the rectory of St. James,) such important part being as follows: "but so that the Incumbent of the said rectory of St. James shall not receive less than the said sum of five thousand dollars a year: and all and any excess of interest arising from the proceeds of such sales, and of the rents, issues, and profits of the lands of such rectory of St. James remaining unsold beyond such annual payment (of five thousand dollars) aforesaid, shall be apportioned to and divided amongst the Incumbents of the other Churches of the Church of England in the said city of Toronto, and such other places in which the lands

belonging to (such) the said rectory of St. James are situate, or which to (such) the said rectory of St. James belong, in such proportions as such Incorporated Synod shall by resolution, by-law, or canon, from time to time order and direct."

The learned counsel did in his reading of the enactment deal with the earlier part of the section by eliminating what was deemed not of direct application to the rectory of St. James, but I have not thought it necessary to state it here.

This manner of reading the section was objected to on the ground that all the words were not dealt with.

After the best consideration I have been able to bestow upon the subject, I am of the opinion that in this way the learned counsel succeeded by an unobjectionable reading of the section in showing that the defendants, the Incumbents of the churches in the Township of York, must, according to this enactment, be included amongst the participants to and among whom the fund is to be apportioned and divided.

But, apart altogether from this reading of the enactment I think it beyond reasonable doubt that the defendants, the Incumbents of the churches in the township, are entitled to participate in this fund upon a distribution of it.

I have already stated the position in which I think the rectory was at and after the conveyances to the Incumbent in the year 1841. It was erected and constituted a rectory within the township of York. Part of the endowment was given by the grant. The remainder of the endowment came to the Incumbent in 1841. There was then one endowment of the rectory, and it was a rectory within the township. The duties of the Incumbent extended over the whole township. The township was his parish, and however the Incumbent of the different rectories might choose to divide the actual labours, the township was also the parish of the Incumbent of St. John's rectory. The defendants the Incumbents of the churches in the township occupy their positions properly under ecclesiastical rules, laws and regulations.

Nothing to the contrary of this was suggested, and how can it be said that the township is not entitled to the benefits that it had and enjoyed, or should have enjoyed, unless there is some reasonably clear enactment taking them away. The statute 29 & 30 Vic. cap. 16, does not in my opinion do so; nor does the Act 41 Vic. cap. 69, (O.) Neither of these statutes contains any such clear words against the township as would be necessary to do so.

It is not suggested that there is any other enactment which has such an effect, and I know of none.

I am of the opinion that the fund as to which this contention is, is a single fund, and that both classes of defendants, the Incumbents of churches in the city, and the Incumbents of churches in the township are entitled to participate in it upon its distribution. The plaintiffs should, I think, take both classes of defendants into their consideration in making a division or apportionment of the money, treating it as a single fund, and not divisible according to the location of any of the lands from the sale of, or out of which the money arises, or has arisen. The questions put by the case use the word "beneficiaries." I think that all the defendants of both classes are beneficiaries in the sense in which the word is used, and in respect to the whole fund as one fund. This virtually answers the whole case. As to the costs I think that all parties are entitled to their costs as between solicitor and client, and that they should be paid out of the property which is the endowment in question.

Judgment accordingly.

G. A. B.

30th March, 1887.—In the case of *The Synod of Huron v. Smith et al.*, heard before FERGUSON, J., where a rectory (St. Paul's) had been similarly constituted at the town of London, within the township of London, and where lands partly in the town (now city) of London and partly in the said township were similarly granted, it was held that the rectory belonged to the township; that the lands were to be considered as one territory, and that the incumbents of churches within the limits of what was the city of London at the time of the passing of 29-30 Vict., chap. 16, as also incumbents of churches in the said township were entitled to share in any excess of interest derived from the sale of the said rectory lands, and it was declared that incumbents of churches thereafter erected in the said territory would also be entitled to share, but that a rector of a church in the township of Westminster, forming part of the parish of St. Paul's, was not so entitled, nor in the event of incorporation with the city of London of that part of the township of Westminster in which the said church is situate, would the rector of the said church be so entitled.

[CHANCERY DIVISION.]

HOLMES ET AL V. MURRAY ET AL.

Will—Devise—Republication of will by codicil—Mortmain—R. S. O. ch. 216—38 Vic. ch. 75 (O.)

A testator made his will dated February 2nd, 1884, in which was contained the following devise: "To the congregation of Burns' Church * * I bequeath the sum of \$2,000 to be used by the trustees of the said Church towards the purpose of purchasing land for a glebe in any place that they may judge suitable, and for erecting thereon a manse, all for the use of the said congregation through their trustees forever." He added two codicils on September 21st, and December 5th, 1885, respectively, not varying the above bequest, but confirming his will, and died on the 27th of December, following.

Helt, [reversing the decision of *Ferguson, J.*] that the fact of the codicils having been executed within six months of the testator's death did not, in the absence of anything in them revoking the charitable gift, render it void under R. S. O. ch. 216, or 38 Vic. ch. 75 (O).

THIS was an action brought by William Holmes and others, executors of one Donald Holmes, against George Murray and others, trustees of Burns' Church, of East Zorra, for the construction of the will of said Donald Holmes, in so far as a bequest to the congregation of Burns' Church, situated in the tenth concession of the township of East Zorra, was concerned.

The bequest in the will and the other material facts are fully set out in the judgment.

The action was tried at the sittings held at Woodstock on November 22, 1886, before *Ferguson, J.*

Oliver, for the plaintiffs. The bequest is void for two reasons: (1) That the testator devised lands to be sold and the proceeds given to a charity, and (2) That it is a gift of personal property for the purchase of land for a charitable purpose: *Murray v. Milloy*, 10 O. R. 46: *Davidson v. Boomer*, 15 Gr. 1.

James MacLennan, Q. C., for the defendants. The defence could not be sustained under the Mortmain Acts alone, but 38 Vic. c. 75 (O.) and R. S. O. c. 216, are in favour of the defendants. The latter Act is now a general

statute and applies to all religious bodies. The first section removes the disability under the Mortmain Act. A will is a mode of conveyance under R. S. O. c. 216, s. 1. Section 10 of the special Act of 1874, 38 Vic. c. 75 (O.) makes the devise good. The will was executed more than a year before the testator's death, although the codicils may have been executed within six months of the death. The date of the will is the date from which the time is to be computed.

The Statutes of Mortmain are not in force in the Province of Nova Scotia: *Wicker v. Hume*, 7 H. L. C. 124, 150, 151. The will should be construed by the laws of Nova Scotia as to the lands: *The Orr-Ewing Case*, 22 Ch. D. 456; *Ray v. The Annual Conference of New Brunswick, &c.*, 6 S. C. R. 308.

Oliver, in reply, R. S. O. c. 216, s. 1, has no reference to a gift by a will. The conveyance of the land must be made by deed. The gift in this case is money, not land; *Ferguson v. Gibson*, 22 Gr. 36; *Leith's Blackstone*, 2nd ed., 298. This will could not be registered as required under s. 14 of R. S. O. c. 216. The date of the last codicil is the date of the will: *Hawkins on Wills*, 2nd ed., 14, 15; *Ccedtite v. Meredith*, 2 M. & S. 15; *Piggott v. Waller*, 7 Ves. 98. There should be clear words to take the case out of the statute: *Labutt v. Campbell*, 7 O. R. 250;

November 29th, 1886, FERGUSON, J.—The plaintiffs are the executors of the last will and codicils thereto of the late Donald Holmes, in his lifetime, of the town of Woodstock, in the county of Oxford.

The defendants are the trustees of Burns' Church, in the township of East Zorra, in the same county. Donald Holmes died on or about the 27th day of December, 1885 having made his will dated the 2nd day of February, 1884, and two codicils (attached thereto) dated respectively, the 21st day of September, 1885, and the 5th day of December, 1885.

The testator after directing the payment of all his just debts, funeral, and testamentary expenses, among other bequests made one as follows :

“To the congregation of Burns’ Church, situated in the tenth concession of the township of East Zorra, in the county of Oxford, hereinbefore mentioned, I bequeath the sum of two thousand dollars, to be used by the trustees of the said church towards the purpose of purchasing land for a glebe in any place that they may judge suitable, and for erecting thereon a manse, all for the use of the said congregation through their trustees forever.” The will contains a residuary gift of all the undisposed of real and personal estate of the testator. The testator by the codicil dated the 21st day of September, 1835, directed that certain lands belonging to him in the township of Pictou, in the the Province of Nova Scotia, should be sold and the proceeds applied in the payment of the several legacies contained in his said will, and, after changing in some other respects some of the bequests contained in the will, and after directing that all the bequests in his will, codicil, or codicils, should be paid by his executors within one year of his decease, and after directing his debts to be paid as soon as possible after his decease, he confirmed in all other respects his will. And the testator, by the second codicil to his will dated the fifth day of December, 1835, after some changes not affecting the gift in question here confirms his said will and codicils thereto.

The action is brought for a declaration that the gift in the will to the congregation of Burns’ Church, that is set out above, is void, as being within the meaning of the Acts commonly known as the Mortmain Acts.

The gift is plainly a gift of money, to be laid out in the purchase of land. By the first codicil there is a direction that certain lands in Nova Scotia be sold, and the proceeds applied in payment of the several bequests contained in the will : but this, I think, makes no difference in considering the matter that I have to decide. A question much like the present was presented in the case, *Murray*

v. *Milloy*, 10 O. R. 46. Many authorities are there referred to respecting a gift by a will of moneys to be laid out in the purchase of land. Counsel for the defendants in the present case scarcely professed to be able to support the defence if the Mortmain Acts alone were to be considered. In this, I think, he was quite right, for I do not perceive how in such case the defence could be sustained.

The defendants, however, relied upon the R. S. O. c. 216, secs. 1, 14, 15, 18 and 19, and 38 Vic., c. 75, (O.) especially s. 10.

A question then arose as to the date of the publication of the will, as the original will was made more than six months before the death of the testator, and each of the codicils within six months before his death; counsel for the plaintiffs contending that the codicils operated as republications of the will, and counsel for the defendants contending against this.

In *Jarman* on Wills, 3rd Eng. ed., vol. 1, p. 178, it is said: "Republication is of two kinds, express and constructive. Express republication occurs where a testator repeats those ceremonies which are essential to constitute a valid execution, with the avowed intention of republishing his will."

"Constructive republication takes place where a testator, for some other purpose, makes a codicil to his will; in which case the effect of the codicil, if not neutralized by internal evidence of a contrary intention, is to republish the will."

In the case *Goodtitle v. Meredith*, 2 M. & S. 15, referred to in *Jarman*, it is said by both the learned Judges that the effect of the codicil is to bring down the will to the date of the codicil, making the will speak as of that date; and Lord Ellenborough added: "Unless indeed a contrary intention be shewn, in which case it will repel that effect." *Hawkins* on Wills, 2nd ed., pp. 14, 15, and the case *Piggott v. Waller*, 7 Ves. 98, may also be looked at on this subject.

In the case *Goodtitle v. Meredith*, LeBlanc, J. said : By this codicil he makes a different disposition of part of his property; the codicil, therefore brings the will down to its own date, making the will speak as of that date."

Now I do not perceive in these codicils, or either of them, or any where any such contrary intention, and I think the will is brought down to the date of the last codicil, and must be considered as re-published at that date; but if either codicil has this effect, the result will be the same here.

I have examined the various sections of the statutes relied on by the defendants, and I am of the opinion that the contention of the defendants cannot be sustained under them or any of them, and I think there should be judgment in favour of the plaintiffs declaring that the gift in question is void. The costs of both parties may, I think, properly be ordered to be paid out of the estate.

Judgment accordingly.

G. A. B.

The defendants moved before the Divisional Court by way of appeal from the above judgment on February 21st, 1887.

MacLennan, Q. C., for the appellants. A codicil is a republication of the will so as even before the Wills Act, to pass after-acquired property, but still that does not affect the question here : *Doe Baker v. Clark*, 7 U. C. R. 44; *Kolje v. Perry*, 3 DeG. J. & S. 481; *Willet v. Sundford*, 1 Ves. Sr. 177. The statutes to be referred to are R. S. O. ch. 216, sec. 18, 19; 38 Vic. ch. 75, (O.). If the testator had said I revoke my will and had then proceeded to make a new one, we would have had nothing to stand on. But here the codicil contains no revocation.

J. S. Mackay contra. This bequest is void under 9 Geo. II., ch. 36. It is a bequest of money to be laid out in land for a charity. R. S. O. ch. 216, and 38 Vic. ch. 75 (O.), apply only to gifts of land. A mere grant of money by a testator with a direction that a certain thing shall be done by the grantee does not make money land or land money, otherwise a gift of land to be sold and the money given to a charity would be held good. Again under R. S. O. ch. 216, sec. 1 a devise is spoken of, shewing that a deed and not a will is referred to. This Act has no reference to a gift of personalty. Several sections of the will are affected by the codicils, and the will must be read as a new one made at the date of the latter: *Goodtitle v. Meredith*, 2 M. & S. 5; *Pigott v. Waller*, 7 Ves. 98; *Jarman on Wills*, 5th Am. ed., vol. 1, pp. 372-4; *Doe v. Walker*, 12 M. & W. 591; *Williams on Executors*, 7th ed., p. 216; *Attorney-General v. Heartwell*, Amb. 451; *Ferguson v. Gibson*, 22 Gr. 36.

March 5th, 1887. BOYD, C.—The testator's will was made in this case on February 2nd, 1884. That will cannot be proved except by the persons who were then its attesting witnesses, and though by the statute now in force the will is to speak from the death of the testator unless a contrary intention be expressed, that does not change the date when the will was made, and that is the only point we are now to consider. Nor does the execution of a codicil which confirms the will or does not revoke it, alter the fact that this will is made at an earlier date. You have still to go back to that date to find when the will was made, though the effect of the codicil may be to republish the will (according to the old phrase) or to draw down its language to the date of the codicil (according to another old phrase). *Hardwicke, C.*, in *D. of St. Albans v. Beauchamp*, 2 Atk. 639, referred to a codicil as in its nature part of the will and an extension of the intention of the testator. In *Hopwood v. Hopwood*, 7 H. L. C. at p. 740, Lord Campbell said: "Although a codicil confirms a will and for certain pur-

poses brings down the will to the date of the codicil, it certainly does not make the will necessarily operate as if the will had been originally made at the date of the codicil." The reasoning in *Doe d. Baker v. Clark*, 7 U. C. R., at p. 55, (though it was in respect of land), is in favour of the validity of this bequest. *Attorney-General v. Heartwell*. Amb. 451, is against this view, and being a case of personalty is more nearly in point than *Willet v. Sandford*, 1 Ves. Sen. 176, on which the case in 7 U. C. R. proceeded. But even if the case in Ambler is well decided, it does not apply to the point now under consideration. That case proceeded on the ground that the will of personal estate spoke only from the death, and for that reason distinguished the case from *Willet v. Sandford*. If that be a sound distinction it does not apply to solve the question as to when the will was made. That is the sole point here under the statutes which validate these bequests to religious bodies. The time-limit in them is doubtless to guard against importunity and undue influences being brought to bear on the minds of testators enfeebled by weakness or disease so as to procure dispositions of property, which Lord Chancellor Northington stigmatizes as "foolish and superstitious." Here, however, the testator's mind was made up on this subject for nearly two years before his death; and in such a case the Court will be more solicitous to further than to frustrate the manifest intention of the testator. The codicils do not revoke but confirm this charitable disposition, and the source of the bounty does not spring from the last codicil, but from the original will.

The intention of the testator is the controlling element in the interpretation of his will, and no technical argument on the effect of the execution of subsequent codicils should be availed of to displace that intention. The statutes which apply are 38 Vic. ch. 75 sec. 10 (O.), (which provides that the bequest is to be made at least six months before the death of the person making the same) and R. S. O. ch. 216, secs. 18, 19 which are *in pari materia*. Here we have a will made by the testator on February 2nd, 1884,

containing a bequest of money to be laid out in land for the benefit of the appellants. His death was nearly two years afterwards. The operation of the two codicils thereafter made within six months of his death is not to vary or revoke any part of this bequest, and I am against using the language of the old cases to the effect that for some purpose a codicil draws down the language of the will to the date of the codicil, so as to avoid this bequest. To all substantial intents and purposes, this will with this bequest was made six months before the death and was not altered and it is to this will that we must go back to find the benefit conferred upon the church. This construction of the word "made" in the statutes is supported by the like rendering of that word in *Rolfe v. Perry*, 3 DeG. J. & Sm. 481. There should be a direction that the bequest to the church is valid, and I favour giving the costs of this appeal out of the estate, to the successful party.

PROUDFOOT, J.—The question in this case is a very short one. Donald Holmes by his will made on February 2nd, 1884, made a gift to the congregation of Burns' Church, in the township of East Zorra, of \$2,000, for the purpose of purchasing land for a glebe and erecting a manse for the use of the said congregation for ever.

The testator did not die till December 27th, 1885, more than six months after the making of the will, so that the bequest was not avoided by the Statute of Geo. II. as to Charitable Trusts. But the testator made two codicils to his will, the first on September 21st, 1885, and the last on December 5th, 1885, both within six months of his death; and if the will is to be read as of either of these dates the bequest is void.

By the first codicil the testator directed certain lands belonging to him in Nova Scotia to be sold, and the proceeds applied in the payment of the several legacies contained in his will, and after changing in some respects some of the bequests contained in the will, and after

directing that all the bequests in his will and codicils should be paid by his executors within one year after his decease, and his debts as soon as possible after his decease he confirmed in all other respects his will ; and by the last codicil, after making some changes not affecting the gift in question, the testator confirmed his said will and codicils.

The question is from what date the will is to speak, from the time it was made, or from the date of the codicils. It is clear that the clause in the Wills Act making a will speak from the death has no application, for then no gift of land to a charity by will could be made, and indeed in this case the question was not whether it spoke from the death but from the date of the codicils.

There is no doubt that for some purposes the will is drawn down to the time of republication or confirmation, as for instance under the old law, to let in after acquired property. In cases affecting real estate, it has been held that if the will be made before the Statute of Charitable Trusts, and confirmed afterwards ; or made more than six months before the death of the testator and confirmed afterwards, that the devise is good : *Willet v. Sandford*, 1 Ves. Sen. 178, 186 ; *Doe Baker v. Clark*, 7 U. C. R. 54 55, 58.

A solitary case, *Attorney-General v. Heartwell*, Amb. 451, decides otherwise as to personal estate to be laid out in land. But there the question was started by the Chancellor who suggested a distinction between a devise of land, and of money to be laid out in land. This was a surprise on the counsel who were not prepared to speak to the question. However, it was argued instantly. The Chancellor said he should always think himself happy when he could, by authority of law, control foolish and superstitious acts of persons disposing of their estates in Mortmain. And he held that as to personal estate the will speaks from the death, and that the codicil made a new will. I am unable to see why a different rule should apply to real estate and to money to be laid out in land. The latter is converted into realty and has all

the qualities of real estate. The decision may have been right enough in that case as to the bequest of the residue of the personal estate, and by the codicil he diminished the residue by giving a few legacies: but in my opinion that would not have sufficed to justify the judgment. Mr. Ambler at the close of his report gives the case of *Willet v. Sandford*, without remark, but it must have been inserted apparently by way of contrast.

I think that the decisions in *Willet v. Sandford*, and *Doe Baker v. Clark*, govern the present, and that the devise to the charity was good.

The case was heard and argued on circuit and the cases above referred to were not cited to the learned Judge; who was in much the same position as Lord Northington in the *Attorney-General v. Heartwell*.

A. H. F. L.

[CHANCERY DIVISION.]

HATTON ET AL. V. BERTRAM ET AL.

Will—Construction—Passing of after-acquired property—Devise of estate by name—Subsequent additions—Completion of building commenced by testator—R. S. O. ch. 106, sec. 26.

J. C. devised to J. B., G. E. S., and J. F. D. all his property and effects, real, personal and mixed upon trust, (after reciting that his intention was to make provision for his daughter E. M. C., and to do it in such a way that the administration of the fund therein-after provided, should be controlled by the trustees of his will), to hold that part of "my property known as 'Walkerfield,' being the property I now reside upon, containing fifty acres more or less, until the same shall be sold by them as hereinafter provided for the use and behoof of my daughter E. M. C., so long as she may desire that the same should remain unsold, and should she desire the same to be sold, then to hold the proceeds of the same upon the same trusts and for the same purposes as hereinafter set directed, with regard to the sum of \$40,000 hereinafter directed to be apart." He then directed his trustees to set apart the sum of \$40,000 to be held by them upon certain trusts, and also a certain further sum to provide an annuity of \$1,200 for his wife, and provided that after the said two funds should have been set apart, the residuary estate should be divided among his nephews and nieces; and lastly, he gave to his trustees "full and absolute power to sell and dispose of all his lands ('Walkerfield,' if sold in my daughter's lifetime, to be sold with her consent only), at such time or times, and in such manner as to them may seem best."

The will was made on September 10th, 1879; and J. C. died December 18th, 1885. After making the will, on June 27th, 1883, J. C. purchased five acres, and on September 21st, 1883, another five acres, forming a block of ten acres, of which one corner nearly coincided with one extremity of a diagonal of "Walkerfield." On November 22nd, 1884, he sold a piece of about three and one-third acres of "Walkerfield."

In his lifetime, J. C. entered into a contract in writing for the erection of a dwelling-house on "Walkerfield," which was not completed at his death, and since his death the executor had paid to the contractor and architect certain sums in respect to it.

Held, affirming the decision of PROUDFOOT, J., that the ten acres subsequently purchased passed under the devise of "Walkerfield."

Per BORD, C.—The word "now," in the devise of "'Walkerfield,' which I now reside upon" should not be allowed to control the other parts of the will, and is not sufficient to oust the effect of the statute by virtue of which the will is to speak from the death."

Held, per PROUDFOOT, J., that the daughter E. M. C. was tenant for life of "Walkerfield," and after the death her children took the proceeds of sale as she might appoint, and in default of appointment equally, and in default of children, the residuary legatees took.

Held, also, per PROUDFOOT, J., that the funds to build the house must come out of the residue.

THIS was an action brought by Ella Margaret Hatton, the only child and sole heiress-at-law of James Campbell,

deceased, and her husband, claiming a declaration that certain lots of land, being lots 4 and 5 on plan 23, for the township of North Monaghan, were a part and parcel of the property known as "Walkerfield," and that as such they passed under the devise of "Walkerfield," in the will of the said James Campbell, the material parts of which are set out in the judgment; and an order restraining one John Bertram, who was executor under the will, from attempting to sell the said lots without the consent of the plaintiff Mrs. Hatton, and from interfering in any way with her peaceful enjoyment of them; and a declaration what title or interest Mrs. Hatton held in the said "Walkerfield," including the two lots in question; the construction of the will so far as necessary, and further relief.

The defendants were the said Bertram, the sole executor, and the children and heirs and heiresses-at-law of John McArthur Campbell, in the will mentioned.

The provisions of the will and the facts of the case sufficiently appear from the judgment.

The action came on for trial at Peterborough, on November 8th, 1886, before Proudfoot, J., when the evidence was taken, and the argument adjourned to take place in Toronto.

On December 1st, 1886, the case came up for argument at Toronto.

Moss, Q. C., for the plaintiff. There can be no doubt on the evidence that "Walkerfield" included the ten acres purchased after the date of the testator's will. Then as to the fund from which the money should come to finish the house, see *Cooper v. Jarman*, L. R. 3 Eq. 98. As to the nature of the plaintiff's interest in "Walkerfield" under the will, if "Walkerfield" is not to be sold unless she wishes it, and she does not consent to a sale, then there is no disposition of it after her life estate, and she takes as sole heiress at law. If, however, a power of sale is exercisable by the trustees after her death, and the proceeds are subject to the second clause in the will, the effect is to give the plaintiff

an estate tail in the property. "Children" mean issue here : *Richardson v. Harrison*, 16 Q. B. D. 85.

Lash, Q. C., for the adult defendants. As to the ten acres not passing under the devise of "Walkerfield," see *Hutchinson v. Barrow*, 6 H. & N. 583; *Cole v. Scott*, 1 McN. & G. 518; *Jarman on Wills*, 4th ed., vol. 1, p. 333. The devise to the trustees in express terms, covers the after acquired property : *Morrison v. Morrison*, 10 O. R. 303. I refer also to *Portal v. Lamb*, 30 Ch. D. 50; *Douglas v. Douglas*, Kay 400; *Webb v. Byng*, 1 K. & J. 580; *Pedley v. Dodds*, L. R. 2 Eq. 819.

MacLennan, Q. C., for the infant defendants. The plaintiff takes an estate for life in "Walkerfield" with remainder to the children as personal estate. There is no estate tail; the children take as purchasers. See *Thornton v. Hawley*, 10 Ves. 129.

Moss, in reply. It is to be remembered that some acres of "Walkerfield" were sold to Cox after the will, and therefore the description by acreage is so far inaccurate as at date of death. I further cite *Castle v. Fox*, L. R. 11 Eq. 542; *Hardwick v. Hardwick*, L. R. 16 Eq. 168; *Re Midland R. W. Co.*, 34 Beav. 525; *Re Otley and Ilkley, R. W. Co.*, 13 W. R. 851; *Hibon v. Hibon*, 11 W. R. 455; *Harrison v. Hyde*, 4 H. & N. 805; *Anstee v. Nelms*, 1 H. & N. 225; *Ricketts v. Turquand*, 1 H. L. Cas. 472; *Doe d. Beach v. Earl of Jersey*, 1 B. & Ald. 550; *Goodtitle v. Southern*, 1 M. & S. 298.

January 8th, 1887. PROUDFOOT, J.—The material parts of the will of James Campbell that require consideration, are the 1st, 2nd, 4th, and 7th sections, and the introductory part to section 1. They are as follows :

"I, the said James Campbell, do hereby give, devise, and bequeath unto my friends John Bertram of, &c., George E. Shaw, of, &c., and James Frederick Dennistoun, of, &c., all my property and effects, real, personal, and mixed, and of any and every kind whatsoever, and wheresoever situated, that I may die seized, possessed of, or entitled to upon trust for the uses, intents, and purposes hereinafter set out.

"I desire to make a provision for my only daughter Ellie Margaret Campbell, and desire to make it in such a way that the administration of the fund hereinafter directed to be provided, shall be controlled by the trustees for the time being of this my will, hoping by this scheme to secure for her the means of perfect independence during her own life-time; and I also desire to make a provision by way of annuity for my wife Clara, as hereinafter provided.

"First—I, therefore, direct that my said trustees shall hold that part of my property known as "Walkerfield," being the property I now reside upon, containing fifty-five acres more or less, until the same shall be sold by them as hereinafter provided, for the use and behoof of my said daughter Ellie Margaret Campbell, so long as she may desire that the same should remain unsold, and *should she desire the same to be sold*, then to hold the proceeds of the same upon the same trusts and for the same purposes as hereinafter directed with regard to the sum of forty thousand dollars hereinafter directed to be set out.

"Second—I direct and my will is, that my said trustees shall, as soon as in their judgment it is convenient, set apart the sum of forty thousand dollars to be by them held upon the following trusts, that is to say, in the first place to invest the same, and in the second place, out of the annual proceeds or income derived therefrom, to pay all expenses which may be incurred about the management of the said fund, including a reasonable compensation to themselves, and the residue of such annual income or proceeds to pay to my said daughter from time to time. And further, in trust as to any part of said sum that may remain in their hands at the time of the death of my said daughter, to pay over the same to and among her children, if any, in such proportions as she may by any instrument executed by her in writing, attested by two or more witnesses, have directed, and in default of any such direction, then equally share and share alike, and in default of a child or children to pay over the same to my residuary legatees hereinafter named."

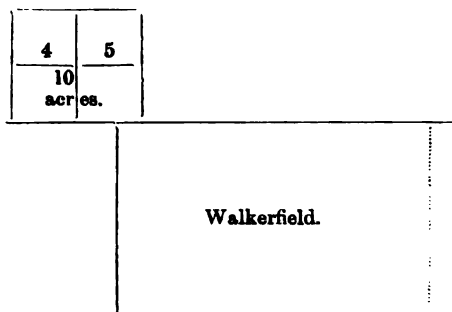
The third section provides for setting apart a fund to produce an annuity of \$1,200 for the wife.

"Fourth—And I direct that after the said trustees shall have my estate sufficiently realized to enable them to set apart the two funds above directed to be set apart, and the same have been so set apart, the rest and residue of my estate shall be by them divided among and paid to my nephews and nieces, children of my deceased brother John McArthur Campbell in his life-time, of Manchester, England, who may be surviving me at the time of my death, and I constitute my said nephews and nieces my residuary legatees, share and share alike.

"Seventh—I hereby give to my said trustees full and absolute power to sell and dispose of all my lands and every of them—"Walkerfield," if sold in my daughter's life-time, to be sold with her consent only, at such time or times and in such manner as to them may seem best."

The will was made on September 10th, 1879. The testator died on December 18th, 1885.

After the making of his will, and on June 27th, 1883, the testator purchased five acres, and on September 21st, 1883, other five acres, forming a block of ten acres, of which one corner nearly coincides with one extremity of a diagonal of "Walkerfield," a small part only of one side lying contiguous to "Walkerfield," somewhat as appears in this diagram :



And also on the 22nd of November, 1884, sold a piece of $3\frac{2}{3}$ acres of Walkerfield in the position marked by the dotted line.

The testator had also during his life-time entered into a contract in writing for the erection of a dwelling house on the property known as "Walkerfield," which was not completed at the testator's death, and the executor has since the testator's death paid to the contractor and architect in pursuance of the said contract \$2,068.75, and is liable for a further sum of about \$800 accruing due under the contract.

The questions for decision are, first as to the estate or interest of the daughter and her children under these provisions of the will in the Walkerfield property. Second, whether the ten acres purchased after the date of the will passed under the description of "Walkerfield"; and Third, from what fund the money paid or to be paid on the building contract is to be taken.

It is clear there is no intestacy as to any part of the estate; whatever is not comprised in the specific devises and bequests, passes under the 4th clause to the residuary legatees.

The whole legal estate in the lands is vested in the trustees, by the devise to them, though without words of limitation: R. S. O. ch. 106, sec. 30; no contrary intention appearing in the will, and in fact a fee being necessary to enable them to carry out the trusts of the will: 3 Jarm. on Wills, 5th Am. ed., p. 55.

There is a trust for sale, an absolute direction to sell; by the first clause the trustees are to hold for the benefit of the daughter until sold as after directed—the after direction is contained in the 7th clause, which repeats the provision that the daughter might desire the same to remain unsold. If she desire it to be sold it will be sold in her life-time. After her death the trustees may sell without any desire by her. The daughter is then in my opinion tenant for life of “Walkerfield,” and after her death her children take the proceeds of the sale, as she may appoint, and in default of appointment equally, and in default of children the residuary legatees take. I cannot read the first clause as directing how the proceeds were to go, only in the case of a sale at the daughter's desire, for that would make the children depend for an interest upon the desire of the mother to sell, and if she did not so desire, the children would get nothing. I therefore read the first clause as applicable to the proceeds of the sale generally, whether at the request of the daughter or under the general trust for sale. The words in the first clause, that are printed in italics should be deemed to apply only to a sale in her life-time, and may be included in a parenthesis, and so not to interrupt the wording of the general trust to sell and to hold the proceeds upon the same trusts as the \$40,000.

The \$40,000 and the proceeds of “Walkerfield” are not to go to the residuary legatees until default of children of the daughter, which implies a gift to the children, and confers upon them an absolute interest.

I think that the ten acres are included in "Walkerfield" and go with it.

The testator had been a merchant, and having retired from business in affluence, he engaged himself in farming, and used "Walkerfield" chiefly as a place for raising thorough-bred stock of different kinds. But on the original "Walkerfield," the only supply of water was from a well. The testator was desirous of getting a better supply, and bought the ten acres chiefly for a valuable spring there found, and at such an elevation that he could carry the water in pipes over intervening elevations and supply "Walkerfield" with an inexhaustible supply of water. These ten acres had been known as the "Alexander" property, and the testator sometimes spoke of it as the "Alexander property." But the evidence is quite clear that he bought it to form part of "Walkerfield." Pierce says he understood the testator bought it to add to his property for farming purposes. He wanted it as it lay close to his land. The testator told him he was anxious to secure it, as he said it would be a good place for hay—as he did not want to bring loads of hay up the avenue. Isabella Alexander had owned lots four and five (each five acres) composing the ten acres; and devised one to his daughter, Mrs. Hopkins, and the other to his daughter, Mrs. Winch. The testator told her he had bought Mrs. Winch's part for water and pasture, being so handy, opening out of his field; and he bought Mrs. Hopkin's part because the other was too narrow. Grundy who had bought Mrs. Winch's part and sold it to the testator, says the testator was anxious to get it for pasture. It joined his own land; he was raising cattle; there was a never failing spring on the lot, and that was one reason he expressed for wanting it. He laid pipes from the spring to a trough to a place near the Campbell lot (Walkerfield). Brenton who had worked for the testator for seven or eight years, says that the testator asked him to buy the lot with the spring, and he would give him \$100 for the bargain. He said he did not want the land but the spring. He wanted to bring the water into his

field, and perhaps into his house. He had a large thoroughbred stock of cattle; he had no water on his farm except a pump in the yard from which the cattle were watered. The source of the spring is higher than the roof of the testator's house. Stapleton, the managing director of the Peterborough Water Works, says the testator told him he was negotiating for the purchase of a portion of the Alexander property for stock use. The lots four and five had good grass and good water. He said he had been encouraged by Rennie, a surveyor, to think he could carry the water into his yard. He discussed with the witness the quality, size, and price of pipes. He spoke of the land, and that it would give him access from his farm to the new purchase, and it would make his place complete as a stock farm. He kept cattle supposed to be thoroughbred; they were registered in the stock book. Elliott says the testator told him of his selling the $3\frac{3}{1000}$ acres to Cox. The witness spoke of his reducing his farm, the testator told him he had bought a piece of the Alexander farm, and it completed his farm and property, and had a living spring. He spoke of it as enabling his cattle to get water readily. He said Cox had offered to give him land in exchange for these lots, (the 10 acres) but he would not accept it, as it made his place complete and he would not part with the spring.

Many other witnesses gave similar testimony, and I have no doubt that the testator bought these ten acres to form an integral part of his Walkertfield farm: that he used them as such, and that they were necessary for the convenient use of "Walkertfield" as a stock raising farm, thus bringing the case within the operation of *Castle v. Fox*, L. R. 11 Eq. 542; *Re Midland R. W. Co.*, 34 Beav. 525, and *Ricketts v. Turquand*, 1 H. L. C. 472, and therefore it passes by the devise of "Walkertfield."

The last question is, from what fund the moneys required for the building of the house are to come? And there can be no question that they must come out of the residue. Even in the case of a deficient estate a residuary legatee

has no right to call upon particular general legatees to abate. The whole personal estate not specifically bequeathed must be exhausted before these legatees can be obliged to contribute anything out of their bequests: 2 Wms. on Executors, 6th ed. 1261.

It seems that Bertram the only surviving executor and trustee had advertised these ten acres for sale, without the consent of the daughter of the testator, who with her husband are the plaintiffs in this action. The first they knew of it was from seeing it advertised. Mr. Hatton spoke to Bertram about it, and got an opinion from an eminent counsel and gave him a copy of it. But Bertram said he intended to sell, and held his own opinion as good as any lawyer. This was the cause of bringing this action and an injunction was obtained to prevent the sale.

I think his conduct unreasonable and vexatious. It is true the will is not very clear upon some matters, but he acted as if it were quite clear, and in a sense in which I think he was wrong. When remonstrated with, if he had applied to the Court stating the doubtful construction of the will, and asking to have it construed, he would have been entitled to his costs. I do not think I can make him pay the costs of the plaintiffs, for had he adopted the reasonable course I have mentioned, the plaintiffs would have had to go into evidence as to the ten acres, but I do not think him entitled to all the costs of his defence. The plaintiffs are entitled to their costs out of the residuary estate, and Bertram is to have such costs only as he would have incurred by asking the Court to construe the will, out of the same fund, and as between party and party, and he is to pay the costs of the injunction.

I do not think the disposal of the costs should be affected by what I understand to be the fact, that the plaintiffs have acquired the interest of the residuary legatees.

The adult defendants moved by way of appeal to the Divisional Court, in respect to the question of what passed under the devise of "Walkerfield," and the motion came

up for argument on February 18th, 1887, before Boyd, C., and Proudfoot, and Ferguson, J. J.

Lash, Q. C., and *E. H. D. Hall*, for the appellants The general devise of after acquired property shews that none of the after acquired property passes under the devise of "Walkerfield": *Morrison v. Morrison*, 10 O. R. 303; *Hutchinson v. Barrow*, 6 H. & N. 583; *Cole v. Scott*, 1 McN. & G. 518; *Castle v. Fox*, L. R. 11 Eq. 542; *Douglas v. Douglas*, Kay 400; *Crombie v. Cooper*, 24 Gr. 472; *Re Milland R. W. Co.*, 34 Beav. 525; *Ricketts v. Turquand*, 1 H. L. Cas. 472; *Webb v. Byng*, 1 K. & J. 580. As a question of description, the devise here is perfect in itself; it is not possible to add to it: *Pedley v. Dodds*, L. R. 2 Eq., 819; *Portal v. Lamb*, 30 Ch. D. 50. It is not suggested that the ten acres were known as "Walkerfield." In the will the testator describes himself as of Walkerfield. The description cannot refer to the date of the death. The section of the Wills Act, R. S. O. c. 106, s. 26, simply refers to real estate. All descriptions in the will speak from the time the will was made: *Hardwick v. Hardwick*, L. R. 16 Eq. 168; *Hickey v. Stover*, 11 O. R. 103.

J. MacLennan, Q. C., for the infant defendants. The testator must be taken to have known that by the law passed six years before he made the will, he was speaking at the time of his death. He shewed his knowledge of this by a general devise of all the property of which he should die possessed. The testator didn't alter his will after he acquired this property. It is not all fancy that the testator considered the state of the law and decided not to alter his will. A prudent man would act thus. On this point I refer to *Re Russell*, *Russell v. Chell*, 19 Ch. D. 432; *Ricketts v. Turquand*, 1 H. L. Cas. 472; *Re Ord*, 12 Ch. D. 22. When something is added to the whole, the addition partakes of the name of the whole. It is not necessary to shew that he had ever called the accretion by the name of "Walkerfield." The onus is not upon us to find something in the will which shews that it is to speak

from the death. The onus is upon the defendants. Everything in the will is in our favour. In *Morrison v. Morrison*, the residuary devise was of what he should die possessed of, that is the last clause of the will; here the first clause of the will is in that way. *Theobald on Wills*, 3rd ed., p. 156, states the effect of the statute, and cites a number of cases. The word "now" does not indicate such a contrary intention as to take a case out of the statute: *Jepson v. Key*, 10 Jur. N. S. 392; *Lord Lalford v. Powys Keck*, 30 Beav. 300.

Moss, Q.C., for the plaintiffs. By the statute every will is to be construed as to the property comprised in it, as speaking from the death, in the absence of a contrary intention. Speaking at the day of his death, he says: "I give 'Walkerfield,'" which at the day of his death comprised 55 acres, more or less: *Castle v. Fox*, L. R. 11 Eq. 542. In *Morrison v. Morrison*, 10 O. R. 301, there was no general devise of the whole of the property at the beginning of the will. *Cole v. Scott*, 1 McN. & G. 518, has since its decision been distinguished much oftener than followed, and there seems to have been a desire to distinguish it when possible.

Lash, Q. C., in reply. No attempt has been made to distinguish, *Hutchinson v. Barrow*, 6 H. & N. 583, which is the nearest case to this one.

March 5th, 1887. *BOYD, C.*—Under the evidence and upon the authority of *Ricketts v. Turquand*, 1 H. L. Cas. 472, under the devise of "Walkerfield," all the land designated by that name and used as part of that estate would pass by his will, though part of the land was acquired after the date of the will. The prior devise in this will of all the land the testator might die seized, possessed of or entitled to upon trust to his executors must be regarded as excepting the estate called "Walkerfield," which was specifically devised to his daughter so long as it should be unsold. R. S. O. ch. 106, secs. 3 and 26, are to be

regarded and their effect considered. By the first clause of the will the whole of the estate then and after acquired is given to the trustees; that unquestionably embraces "Walkerfield" as it was at the date of the will, and "Walkerfield" as it was added to, at the death of the testator (by virtue of sec. 3). He then directed his trustees to hold that part of his property known as "Walkerfield" (being the property I now reside upon containing 55 acres more or less) for the use of his daughter. If you reject "now" it would be perfectly clear that "Walkerfield" (including its after-acquired part) as it was devised to the trustee was to be held for the benefit of his daughter.

The testatum clause of the will shews it was executed on September 10th, 1879. The death of the testator was in December, 1885. Is the word "now" to be read as referring to the date of the will, or by operation of the statute (sec. 26) to the death of the testator, or is it to be rejected as meaning no more than would be implied if the clause read "being the property I now reside upon?" The last construction is in my view the proper one and it is supported by the case of *Wagstaff v. Wagstaff*, L. R. 8 Eq. 230. The will is to speak from the death, unless a contrary intention appears by the will; the testator's manifest intention here is to give "Walkerfield" to his daughter as he himself enjoyed it, and as he was in occupation of it at the time of his death. This word "now" should not be allowed to control the other parts of the will: according to *Castle v. Fox*, L. R. 11 Eq. 542, and *Saxton v. Saxton*, 13 Ch. D. 359, it is not sufficient for that purpose to oust the effect of the statute. The after-acquired property in connection with "Walkerfield" was here intended to pass by the will to the trustees, and by the will they were to hold "Walkerfield" for the use and benefit of his daughter, as already mentioned.

Morrison v. Morrison, 10 O. R. 303, appears to me sufficiently distinguishable from the present case so as not to be in conflict with what is now decided. A case that

may be usefully referred to is *Leckey v. Watson*, I. R. 7, C. L. 157.

The judgment should be affirmed, with costs.

FERGUSON, J., concurred.

A. H. F. L.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN THE

QUEEN'S BENCH, COMMON PLEAS, AND CHANCERY DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

ACCOUNT.

Tenant for life accounting for moneys recovered for land expropriated.]—See ESTATE.

ACQUIESCENCE.

See MUNICIPAL CORPORATIONS, 4
—BANKRUPTCY AND INSOLVENCY, 2.

ADMINISTRATION.

Champerty—Administration action—Champertous agreement to get control of a claim on which to apply for administration order—Petition to set aside administration order—Creditors' rights thereunder—Champertous claim disallowed]—O. assuming that the firm of T. & O., of which he was a member, had a small claim of about \$300 against the estate of A. M. C., a deceased intestate, ascertained that H. & Co.

had a large one of over \$7,000 on promissory notes, and tried to induce H. & Co. to join him in an action for the administration of A. M. C.'s estate, which they declined to do. H. & Co. offered to sell their claim to him for \$2,000, which offer O. refused to accept, but finally, without the payment of any valuable consideration, obtained an assignment of H. & Co.'s claim for the purpose of collecting it, under an agreement by which he was to pay H. & Co. one-half of the amount collected on said claim after payment of costs. H. & Co. did not make themselves responsible for any costs. O. obtained an administration order against M. E. C., the administratrix of A. M. C., who, not knowing anything of the claim on the H. & Co. notes, did not resist the making of the order; but when the facts were elicited in the Master's office, and when O.'s own claim was disallowed by the Master, filed a petition to have the order set aside on the grounds of champerty.

Held, that as a decree for administration is for the benefit of all the creditors, and as another creditor had established a claim under it, the administration order could not be set aside.

Held, also, that the agreement between O. and H. & Co. was champertous, or so strongly savouring of it, that it could not be maintained, and that O. could not prove on the notes in this administration suit.

Reynell v. Spyre, 1 D. M. & G. 671, and *Hutley v. Hutley*, L. R. 8 Q. B. 112, considered. *Re Cannon, Oates v. Cannon*, 70.

See LIMITATIONS (STATUTE OF)—3.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

ADJOURNMENT.

Of hearing by Magistrate.—See CAN. T. A., 1878, 2.

ALIEN.

See SHIPS AND SHIPPING.

ALTERATION

Of Deed.—See DEED, 2.

AMENDMENT.

By adding party.—See RECEIVER—DEED, 2.

Of pleading.—See DEFAMATION, 2.

APPEAL.

See VOTERS' LISTS.

APPROPRIATION OF PAYMENTS.

See PRINCIPAL AND SURETY, 3.

ARBITRATION AND AWARD.

Reference to arbitration—*Stay of proceedings*—C. L. P. Act, sec. 214—*Scope of reference*—*Construction of agreement*—*Pending action to reform*—*Powers of arbitration*—*Injunction.*—By a consent judgment in an action between members of a certain pool association for the sale of lubricating oil, it was provided that "all matters which may hereafter come into dispute between the association or board of directors thereof, or any member or members * * relative to the said agreement" (sc. the original agreement of association), or any alleged breach or non-observance thereof, or of any of the rules or regulations made, or to be made, by the said board thereunder, and all matters of complaint by any member or members against any other member or members in respect of the premises," should be referred to arbitration as therein specified.

Acting under the agreement, the board had fixed a sum of three cents per gallon to be paid to the association by the parties thereto, on the sale of any lubricating oil.

A dispute now arose on the motion of one of the members as to whether the three cents per gallon were payable on sales made by one member of the association to an-

other, and whether the rate was payable upon the proportion of distilled petroleum used in making axle grease.

Held, that these matters were properly within the scope of the arbitrator under the above clause in the judgment, though they amounted to a dispute upon the construction of the agreement and the rules made under it, and it was no objection that in the course of the reference it might be necessary to procure an injunction, which an arbitrator could not grant.

Semble, if it should be established to his satisfaction that the parties ought to be relieved from certain things covered by the agreement, the arbitrator might so relieve them.

Held, also, that the mere fact of an action to reform the agreement having been brought and pending did not paralyze the power of the arbitrator.

Willesford v. Watson, L. R. 14 Eq. 572, followed, *Piercy v. Young*, 14 Ch. D. 200, commented on. *Woodward et al. v. McDonald et al.* 671.

ASSESSMENT AND TAXES.

See TAX SALE.

ASSIGNS.

Omission of, from covenant—Effect of.—See LANDLORD AND TENANT, 1.

BANKRUPTCY AND INSOLVENCY.

Fraudulent preference—Insolvency—What constitutes—R. S. O. ch. 118 48 Vic. ch. 26, s. 2 (O.)—Dower—

Judgment creditor—Trial of equitable issues by jury—Entry of judgment by Divisional Court.]

The meaning of R. S. O. ch. 118, as amended by 48 Vic. ch. 26, sec. 2 (O.), is that a conveyance of property which has the effect of defeating, delaying, or prejudicing creditors, or of giving a preference, is utterly void when made by a person at a time when he is in insolvent circumstances, or unable to pay his debts in full, or knows that he is on the eve of insolvency.

In an action by the plaintiff, a creditor, to set aside a mortgage made by the debtor to the defendant M. *Held*, on the evidence, the debtor was insolvent when he made the mortgage, whereby the defendant obtained a preference over the other creditors, including the plaintiff, and that the mortgage must be set aside.

Held, also, following, *McDonald v. McCall*, 12 A. R. 593, a creditor, to maintain the action, need not be a judgment creditor.

Per ROSE, J., a debtor is legally insolvent when he has not sufficient property to pay all his debts, if sold under legal process; and commercially insolvent when he has not the means to pay off and discharge his commercial obligations as they become due in the ordinary course of business.

Per CAMERON, C. J.—In determining whether a debtor is insolvent, &c., his assets or effects are not to be estimated at what they might bring at a forced sale under execution, but at the fair value in cash on the market at any ordinary sale.

Per ROSE, J., also. Evidence of the value of the right of dower is properly admissible in determining the value of a debtor's liabilities.

Two of the debts were to relatives of the debtor, secured by mortgage and promissory notes. The learned Judge at the trial charged that because the debts were under the control of the debtor they should not be included in estimating the liabilities.

Per ROSE, J.—This was misdirection.

Per ROSE, J., also. There is nothing to prevent a Judge directing the jury to find on equitable issues.

In this case the jury having found for the defendants, the Court, on the evidence, directed the judgment to be entered for the plaintiff. *Rae v. McDonald et al*, 352.

2. *Assignment for creditors—Costs of attacking a fraudulent preference—Making good to the estate moneys spent on useless legal proceedings—Acquiescence by creditors in misuse of moneys and estate.*—W. assigned all his estate by deed to B., one of his creditors, in trust for his creditors generally. Afterwards, at a meeting of creditors, it was resolved, with B.'s consent, that M., as an execution creditor of W., should bring an action on behalf of all the creditors of W. to consent to the validity of a certain chattel mortgage made to H. & Co. by W. prior to the above assignment to B., the costs of which the creditors present agreed should be borne by the estate. H. & Co., were not present at the meeting. This action by M. was dismissed, with costs, and B., who had retained the solicitor and really managed and controlled the action, paid the defendants H. & Co.'s costs of that action, and also the costs of the solicitor who acted for M., out of the moneys of the estate, \$462 in all.

H. & Co., as creditors of W., now brought this action, asking that the executors of M. should pay the \$462 to B., to be distributed among the creditors of W.

There was no evidence of M. or his executors having requested B. to pay the \$462 of costs.

Held, that as to the \$300 paid to M.'s solicitor no request on M.'s part to B. to pay this to the solicitor could be implied, for M. did not retain the solicitor or manage the proceedings, but merely allowed his name to be used as plaintiff, and M. was not liable to the solicitor as to those costs, and therefore the plaintiff failed as to that sum, though, *Semle*, B. had no authority to expend moneys of the estate in endeavouring to get or obtain property not assigned to him.

Held, also, that the plaintiffs could not succeed as to the balance, \$162, for there could be no reasonable doubt that they knew that these \$162 which were paid to them by B., as their costs of defence, were moneys of the estate of which B. was trustee, and must be held to have assented to its being paid. *Hyman & Co. v. Howell et al*, 400.

3. *Assignment for benefit of creditors—48 Vic. ch. 26 (O.)—Constitutionality—Retrospectivity—Payments within thirty days—Provincial legislature.*

Held, following *Broddy v. Stuart*, 7 C. L. T. 6, that 48 Vic. ch 26, (O.), is *intra vires* the Provincial Legislature.

Where the plaintiff sought to invalidate certain payments of money made by an insolvent debtor within thirty days prior to his making an assignment under the said Act, but before it came into force,

Held, on demurrer, that the claim could not be sustained either upon the ground that the statute was retrospective, or upon the ground that what the plaintiff sought to obtain was defined and given by sec.

3, sub-sec. 3, of the statute. *Clarkson v. The Ontario Bank*, 666.

Of Stockbrokers, and sale of Seats of at Stock Exchange.—See STOCK EXCHANGE.

Rule as to interest.—See LIMITATIONS, (STATUTE OF), 2.

BANKS.

Banks and Banking—Action to recover amount of cheque—Endorsation—Company—Mode of conducting business.—The I. Bank cashed a cheque payable to the order of the T. Manufacturing Company upon the endorsation of the Secretary alone, who had on several previous occasions cashed other cheques in the same way, and acted as general agent of the company.

Held, in an action by the company against the bank to recover the amount of the cheque, that the bank was justified in cashing the cheque, although the by-laws of the company required that the cheque should be countersigned by the President. *Thorold Manufacturing Company v. The Imperial Bank*, 330.

BASTARD.

Support of child—Liability for maintenance—R. S. O. ch. 131, sec. 1—Custody and care of child.—The father of an illegitimate child has the right to the custody and care thereof, except as against the mother, who has the right against the father.

To an action under R. S. O. ch. 131, sec. 1. by the plaintiff, the maternal grandmother of an illegitimate female child, for food, clothing, lodg-

ing, and other necessities, supplied to the child at the mother's request, the defendant set up as a defence that he demanded the child from the plaintiff and from the mother, and informed them that he would support the child, and had always been ready and willing to do so, and to furnish her with food, &c., yet the plaintiff and the said mother have and still refuse to deliver up the child or allow the defendant to support her.

Held, on demurrer, that this constituted no answer to the action. *O'Rourke v. Campbell*, 563.

BIGAMY.

See CRIMINAL LAW, 2.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See CRIMINAL LAW, 1.—SALE OF GOODS — ESTOPPEL — LIMITATIONS (STATUTE OF), 3.

BILLS OF SALE AND CHATTEL MORTGAGES.

See EVIDENCE, 2.

BROKER.

Sale of seat of, at Stock Exchange, on Insolvency.—See STOCK EXCHANGE.

BY-LAW.

Illegality of.—See MUNICIPAL CORPORATIONS, 3.

CANADA TEMPERANCE ACT, 1878.

1. *Information laid before one magistrate—Conviction quashed.*—

Held, following *Regina v. Ramsay*, 11 O. R. 210, that a conviction under the Canada Temperance Act 1878, upon an information laid before one magistrate only, was bad and must be quashed. *Regina v. Johnson*, 1.

2. *Canada Temperance Act, 1878—Adjournment for more than a week—32-33 Vic., ch. 31, sec. 46 (D.)—Conviction quashed—Consent—Jurisdiction.*—Where the magistrate adjourned the hearing of a case under the Canada Temperance Act, 1878, for more than a week, contrary to the 32-33 Vic., ch. 31, sec. 46 (D.), the conviction was quashed, but without costs.

Semble, the consent of the defendant to the adjournment, if proved, would not have given jurisdiction. *Regina v. French*, *Regina v. Robertson*, 80.

3. *Canada Temperance Act, 1878, secs. 108, 109, 111, 119—Search warrant, when proper to be issued—Certiorari, when taken away—Presumption that liquor kept for sale, when created by the finding of appliances for sale—Municipal by-law under the Act—Search warrant and conviction quashed, with costs.*—An information charging defendant with having sold intoxicating liquor was laid before two Justices of the Peace, and immediately afterwards a further information to obtain a search warrant was sworn by the same complainant before the same two Justices. Thereupon a warrant to search the premises of defendant was issued under the hand and seal of one only

of the Justices. Upon the search being made three bottles were found, each containing intoxicating liquor, and it was sworn that there were also found in defendant's house other bottles, some decanters and glasses, and a bar or counter.

On the day following the search the complainant laid a new information before the same two Justices of the Peace, charging the defendant with keeping intoxicating liquor for sale. Upon the hearing the constables who executed the search warrant were the only witnesses examined, and on their evidence the defendant was convicted.

Upon motion to quash the search warrant and conviction,

Held, that secs. 108 and 109 of the Act were intended to provide process *in rem* for the confiscation and destruction of liquor in respect of which a use prohibited by the statute was being made, and not to provide a means of obtaining evidence on which to found a prosecution or support one already begun.

Held, also, that the warrant in this case was illegal, because issued by one Justice of the Peace only.

Held, also, that the operation of sec. 111 of the Act, in taking away the right to certiorari, is confined to the case of convictions made by the special officials named in the section.

Held, also, that the presumption of keeping liquor for sale created by sec. 119 of the Act arises only where the appliances for the sale of liquor, mentioned in the section, together with the liquor, are found in municipalities in which a prohibitory by-law, passed under the provisions of the Canada Temperance Act, is in force.

As it appeared that in this case the search warrant had been issued,

and the defendant's premises searched, for the mere purpose of possibly securing evidence upon which to bring a prosecution, the Justices of the Peace and the informant were ordered to pay the defendant's costs.

4. *Canada Temperance Act, 1878, sec. 103—Police magistrate—Jurisdiction.*—The defendant was convicted at the town of Perth by the police magistrate for the south riding of the county of Lanark for selling, in the said town of Perth, intoxicating liquor contrary to the Canada Temperance Act, 1878. The authority of the police magistrate was derived from a commission appointing him for the south riding of Lanark as constituted for purposes of representation in the Legislative Assembly of Ontario. The same magistrate had been a few weeks previously by a separate commission appointed for the north riding of Lanark. The town of Perth was situate wholly within the said south riding.

Held, [ARMOUR, J., dissenting,] that said magistrate was not a police magistrate for the town of Perth within the meaning of the 103rd section of the Canada Temperance Act, 1878, and that Perth could not by virtue of the said commission appointing a police magistrate for the south riding of the county be held to be a town having a police magistrate.

Per ARMOUR, J., that Perth was under the circumstances a town having a police magistrate, and the said police magistrate had therefore in this case jurisdiction to convict. *Regina v. Young*, 198.

5. *Canada Temperance Act, 1878, ss. 99, 100—Conviction of buyer of liquor as aider and abettor—32-33*

Vic. ch. 31. s. 15, (D.)—The provisions of 32 & 33 *Vic. ch. 31, (D.)* apply to the Canada Temperance Act, 1878, except in so far as the provisions of the latter Act show that they were not intended to apply thereto.

Held, that a buyer of liquor cannot, in respect of a sale thereof made to him, be regarded in point of law as an aider, abettor, counsellor, or procurer, so as to come within sec. 15 of 32-33 *Vic. ch. 31, (D.)*, and render that section applicable to an offence under sec. 99 of the Canada Temperance Act.

A conviction of a buyer of liquor as such aider, &c., was therefore quashed. *Regina v. Heath*, 471.

6. *Canada Temperance Act, 1878, sec. 123—Defendant compellable to answer criminating questions—Jurisdiction of Divisional Court—Practice—41 Vic. ch. 16 (D.)—Order to quash conviction made on default.*—*Held*, that under sec. 123 of the Canada Temperance Act, 1878, a defendant is compellable, when called as a witness, to answer questions, even though tending to criminate himself.

Review of legislation on the subject of such evidence.

Where an order quashing a conviction is made upon default of anyone appearing to support it, the effect of quashing it not only involving the restoration of the fine paid by the defendant, but exposing the convicting magistrate to an action, there is inherent jurisdiction in the Court to open up such order so made.

The jurisdiction of the full Court to rehear motions to quash convictions has not been taken away by the Judicature Act, but still exists in the Divisional Courts.

Regina v. Halpin, 12 O. R. 330, not followed. *Regina v. Fee*, 590.

7. *Canada Temperance Act—Evidence — Jurisdiction — Conviction quashed.*—There being no evidence that any beverage of an intoxicating character had been sold, and therefore no evidence to support a conviction under the Canada Temperance Act, 1878, for selling intoxicating liquors, *Held*, that the magistrates had no jurisdiction, and the conviction was therefore quashed, and under the circumstances shewn, with costs against the prosecutor. *Regina v. Beard*, 608.

8. *Canada Temperance Act, 1878, sec. 108, 109, 119—Evidence sufficient to support conviction for keeping liquor for sale—Adjournment for more than one week—32-33 Vic. ch. 31, sec. 46, (D.)—Conduct of defendant waiving his right to object.*—Pending a prosecution against defendant for selling intoxicating liquor contrary to the provisions of the Canada Temperance Act, an information was laid by the prosecutor to obtain a search warrant, and upon search a barrel of beer connected with a beer pump, and all the usual appliances for sale of liquor, were found on defendant's premises. An amendment of the charge was afterwards made altering it into an information for unlawfully keeping for sale; a new information was sworn, and defendant was convicted of the latter offence.

Held, that before a search warrant can issue under sec. 108 of the Act, such offence against the provisions of the Act must be shewn to have been committed, and that the information for a search warrant and the evidence in this case shewed a previous offence to have taken place.

Held, also, that the evidence given before the police magistrate shewed a keeping for sale, without reference

to the special provisions of sec. 119 of the Act.

The fact that the search warrant was executed by the informer, who was also chief constable, was held not to be a ground for quashing the conviction.

Held, also, that where an adjournment of the proceedings before the magistrate for more than one week had been made at the request of the defendant, who afterwards attended on the resumed proceedings, taking his chances of securing a dismissal of the prosecution, and urging that on the evidence it ought to be dismissed, defendant had estopped himself from objecting afterwards that such subsequent proceedings on the prosecution were on this ground illegal.

Semble, that the provisions of sec. 46 of 35-33 Vic. ch. 31, (D), that no such adjournment shall be "for more than one week," are directory merely.

Regina v. French and Regina v. Robertson, 13 O. R. 80, distinguished and not followed. *Regina v. Hefferman*, 616.

9. *Canada Temperance Act, 1878, secs. 2, 103—Police magistrate—Jurisdiction.*—The Town of Paris is an incorporated town wholly within the county of Brant. The defendant was convicted before a police magistrate, whose commission was for the county of Brant, exclusive of the city of Brantford, for that she did at the town of Paris, in said county of Brant, unlawfully sell intoxicating liquor contrary to the Canada Temperance Act, 1878.

Held, that said magistrate was not, within the meaning of sec. 103 of the Canada Temperance Act, 1878, a police magistrate for the town of Paris, and that the town of Paris could not, by virtue of the said com-

mission appointing a police magistrate for the county of Brant, he held to be a town having a police magistrate.

Regina v. Young, 13 O. R. 198, followed. *Regina v. Bradford*, 735.

CARRIERS.

1. *Carriers of goods—Contract—Principal and agent—Damages—Low rates—Public policy—Bill of lading—Foreign law.*—The plaintiffs ordered goods from K., L. & Co., to be shipped to plaintiffs at Flat Creek, Manitoba, via the C. M., &c., Ry. Co., by which line plaintiffs had an arrangement for a special rate of freight, of which they informed K., L. & Co., but did not notify them of the terms thereof. K., L. & Co. delivered the goods to C. & M. at Montreal, as agents of the defendant's line of boats, consigned to the plaintiffs, to be sent by the said line of boats to M., and thence by the C., M., &c., Ry., and informed C. & M. of the fact of plaintiffs' having a special rate. The bill of lading which C. & M. gave for the goods was prepared by a clerk of K., L. & Co., who stated that he attached thereto a ticket marked "Ship our freight by C., M., &c., Ry.; great bonded fast line; low rates." The goods were carried by defendant's vessel, not to M., but to D., and thence by railway to their destination, and were accepted by plaintiffs, but plaintiff had to pay higher freight than if carried as directed. The goods were carried from D. as quickly, or more quickly, than they would have been from M., and the freight would have been less had it not been for plaintiffs' special agreement with the C., M., &c., Ry. Co.

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The defendant's conduct in sending the goods by D. was proved to have been wilful.

Held, that there was a valid contract to carry via M., and that plaintiffs were entitled to recover for the breach thereof in not carrying therefrom; but *Held*, [reversing the judgment of WILSON, C. J., at the trial,] that the plaintiffs could only recover nominal damages.

Held, also, following *Friendly v. Canada Transit Co.*, 11 O. R. 756, that the plaintiffs were the owners of the goods, and entitled to maintain the action.

Held, also, that the contract for the low rate could not be assumed to be illegal, as being contrary to public policy, because lower than the ordinary local rates; for even if it could not be enforced by plaintiffs against the company this would be no defence to the defendant.

Held, also, that the fact of the bill of lading having been made in the Province of Quebec, did not deprive plaintiffs of the benefit of R. S. O. ch. 116, for not only was this not set up by the pleadings, but also it did not appear that the Quebec law was different from that of Ontario, and in the absence of proof it would be assumed to be the same. *Langdon et al. v. Robertson*, 407.

2. *Railways—Failure to deliver goods—Demand of charges—Sale of property—Conversion—Damages*—42 Vic. ch. 9, sec. 17, (D.)—The plaintiff on the 2nd March, 1882, delivered to the G. W. R. Co. at L., Ont., 840 bushels of oats, to be carried by said railway and connecting railways to B., Man., and there delivered to the plaintiff. The oats were shipped in car No. 6263, and while in transit were transferred to car No. 3966 of the St. P., M. & M. R.

W. Co. Before the arrival of the oats the plaintiff arranged with the defendants' agent at Winnipeg to have car 6263 stopped at Winnipeg. The oats were not stopped at Winnipeg but were carried on to Brandon. The plaintiff, before leaving Brandon and making the Winnipeg arrangement, had instructed his agent at Brandon to receive the oats. The oats arrived at Brandon on the 5th May. The plaintiff's agent at Brandon frequently applied for the same, but was informed they had not arrived. The defendants alleged that notice of arrival was sent by post card to the plaintiff's proper address at Brandon, but there was no evidence to shew that this reached the plaintiff, and the goods, being of a damagable or perishable nature, were, on 22nd July, sold by defendants. In an action for non-delivery and conversion,

Held, [reversing the judgment of GALT, J., at the trial] that the plaintiff was entitled to recover: that the defendants were not protected by 42 Vic. ch. 9, sec. 17, (D.) and sub-sections, for to come within it the goods must remain in the defendants' possession for at least a year, unless the tolls have been demanded from the persons liable, and payment refused or neglected for six weeks after demand; and though sub-sec. 3 says nothing of a demand, the whole section must be read together, which shews a demand was required: that the post card was not a sufficient demand, unless it was shewn to have reached the person it was addressed to: that there was no breach in not stopping at Winnipeg, as the contract to stop only applied to car 6263; and that the plaintiff was entitled to recover as damages the value of the oats at Brandon at the

time of conversion; but, as there were some difficulty in ascertaining this, the Court thought substantial justice would be done by allowing the plaintiff the price paid at L. with six per cent. interest added. *Worden v. Canadian Pacific Railway Company*, 652.

CASES.

Bacon v. Shier, 16 Gr. 485, considered and distinguished.]—See MORTGAGE, 1.

Broddy v. Stuart, 7 C. L. T. 6, followed.]—See BANKRUPTCY AND INSOLVENCY, 3.

Cook v. Grant, 32 C. P. 511, distinguished.]—See LIMITATION (STATUTES OF) 1.

Cook v. Grant, 32 C. P. 511, considered.]—See LIMITATIONS (STATUTE OF) 1.

Cornish, Re, 6 O. R. 259, followed.]—See PRACTICE.

Cory v. Yarmouth, 3 Ha. 596, considered and followed.]—See INFUNCTION.

Crowter Re, Crowter v. Hinman, 10 O. R. 159, distinguished.]—See EXECUTORS AND ADMINISTRATORS.

Eccles v. Lowry, 23 Gr. 167, commented on.]—See EXECUTORS AND ADMINISTRATORS, 3.

Eccles v. Lowry, 23 Gr. 167, considered.]—See LIMITATIONS (STATUTE OF) 3.

Friendly v. Canada Transit Co., 11 O. R. 756, followed.]—See CARRIERS, 1.

Hutley v. Hutley, L. R. 8 Q. B. 112, considered.]—See ADMINISTRATION.

Johnston v. Shortreed, 12 O. R. 633, followed.]—See EVIDENCE, 2.

Letton v. Goodden, L. R. 2 Eq. 123, considered and followed.]—See INJUNCTION.

Matheson v. Kelly, 24 C. P. 508, distinguished.]—See LANDLORD AND TENANT, 2.

Mayor of Kidderminster The, v. Hardwick, L. R. 9 Ex. 18, cited.]—See MUNICIPAL CORPORATIONS, 5.

McConkey v. Brockville, 11 O. R. 322, followed.]—See EVIDENCE, 2.

McDonald v. McCall, 12 A. R. 593, followed.]—See BANKRUPTCY AND INSOLVENCY, 1.

Munro v. Butt, 8 E. & B. 738, distinguished.]—See MUNICIPAL CORPORATIONS, 4.

Piercy v. Young, 14 Ch. D. 200, commented on.]—See ARBITRATION AND AWARD.

Regina v. Butterwick, 2 M. & Rob. 196, followed.]—See CRIMINAL LAW, 1.

Regina v. French, 13 O. R. 80, distinguished and followed.]—See CAN. TEMP. ACT, 8.

Regina v. Halpin, 12 O. R. 330, not followed.]—See CAN. TEMP. ACT, 6.

Regina v. Harper, 7 Q. B. D. 78, followed.]—See CRIMINAL LAW, 1.

Regina v. Mopsey, 11 Cox, 143, followed.]—See CRIMINAL LAW, 1.

Regina v. Ramsay, 11 O. R. 210, followed.]—See CAN. TEMP. ACT, 1.

Regina v. Robertson, 13 O. R. 80, distinguished and not followed.]—See CAN. TEMP. ACT, 8.

Regina v. Young, 13 O. R. 198, followed.]—See CAN. TEMP. ACT, 9.

Reynell v. Spire, 1 D. M. & G., 671, considered.]—See ADMINISTRATION.

Robins v. Brockton, 7 O. R. 481, referred to.]—See MUNICIPAL CORPORATIONS, 4.

Stephen v. The Commissioners of Police of Thurso, 3 Court of Sessions Cas. 4th series, referred to.]—See MASTER AND SERVANT, 2.

Ward v. National Bank of New Zealand, 8 App. Cas. 755, followed.]—See PRINCIPAL AND SURETY, 3.

Willesford v. Watson, L. R. 14 Eq. 572, followed.]—See ARBITRATION AND AWARD.

CEERTIORARI.

Where right to, abolished.]—See CANADA TEMPERANCE ACT, 1878, 3.

CHAMPERTY.

See ADMINISTRATION.
See LIMITATIONS (STAT. OF), 3.

CHEQUE.

See BANKS.

COMMISSION.

Recovery of by agent.—See PRINCIPAL AND AGENT.

COMPANY.

Defective organization of.—See MUNICIPAL CORPORATIONS, 2.

COMPENSATION.

Vendor and purchaser—Representation as to rents in advertisement—compensation—Heating—Taxes.—K. purchased certain property at auction which had been advertised. Among the representations made in the advertisement, was one that it "at present rents for \$1,160." After the sale the purchaser applied for compensation on two grounds: (1) That the landlord was bound to heat the building for the tenants, the cost of which was not included in the \$1,160, and (2), That the \$1,160 did not include the taxes which the landlord had to pay.

Held, that he was entitled to compensation on both grounds, and a reference was ordered to ascertain the amount. *Re Murray and Kerr*, 414.

CONDITIONS.

Precedent and Subsequent.—See WILL, 2.

See ADMISSIBILITY OF EVIDENCE.

CONSENT.

See CANADA TEMPERANCE ACT, 1878, 1.

CONSIDERATION.

For bills of exchange.—See SALE OF GOODS.

CONVERSION.

See CARRIERS, 2.

CONSTITUTIONAL LAW.

See BANKRUPTCY AND INSOLVENCY, 3

CONTRIBUTION.

See PRINCIPAL AND SURETY, 3.

CONVICTION.

Insufficient ground for quashing.—See CANADA TEMPERANCE ACT, 1878-8.

See CANADA TEMPERANCE ACT, 1878, 1, 7.

COSTS.

Justices ordered to pay.—See CANADA TEMPERANCE ACT, 1878, 3, 7.

See BANKRUPTCY AND INSOLVENCY, 2.

COUNSEL.

Privilege of.—See DEFAMATION, 1.

COUNTERCLAIM.

See SALE OF GOODS.

COVENANT.

Not running with land.]—See
LANDLORD AND TENANT, 1.

CRIMINAL LAW.

1. *Criminal law—Forging endorser's name to promissory note—No maker's name thereto at the time*—32-33 Vic. ch. 19 (D.)—W., a Division Court bailiff, had an execution against the prisoner and H. M., and to settle same they arranged to give a note made by A. M. and endorsed by A. D. M. W. then drew up the note in question, which was payable to the order of A. D. M., and which he handed to the prisoner, who took it away to obtain, as he said, A. D. M.'s endorsement, returning shortly afterwards with the name A. D. M. endorsed thereon. He then handed the note to A. M., who signed his name as maker, and handed it to W., who took it away with him. The endorsement was a forgery. The prisoner was indicted for forging the endorsement on a promissory note and convicted.

Held, following *Regina v. Butterwick*, 2 M. & Rob. 196; *Regina v. Mopsey*, 11 Cox 143, and *Regina v. Harper*, 7 Q. B. D. 78, that the conviction could not be sustained on the indictment as framed. The instrument, by reason of the maker's name not being signed to it at the time of the forgery, was not a promissory note; and neither could the conviction be sustained on the count for uttering, as after it was signed by A. M. it was never in the prisoner's possession, but was delivered by A. M. to witness.

Per CAMERON, C. J. As to the meaning of sec. 45 of 32-33 Vic. ch. 19 (O.), that possibly a conviction

could be had under it, unless it only extended to forgery by making a copy of some existing document or thing written or printed or otherwise capable of being read, for the purpose of fraud, and not to the forgery of a name on a paper written properly as an original paper, and not as a copy. *Regina v. McFee*, 8.

2. *Criminal law—32-33 Vic. ch. 20, sec. 58—Bigamy—Second marriage contracted out of Canada—Misdirection—Non-direction—Sufficiency of indictment—Nullity.* The prisoner was convicted of bigamy under 32-33 Vic. ch. 20, sec. 58, which enacts that whosoever, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada or elsewhere, is guilty of felony . . . provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in Canada by any other than a subject of Her Majesty, resident in Canada and leaving the same with the intent to commit the offence.

The first marriage was contracted in Toronto, the second in Detroit, U. S.

The Judge at the trial directed the jury that if the prisoner was married to his first wife in Toronto and to the second in Detroit they should find him guilty.

Held, a misdirection, and that the jury should have been told in addition that before they found him guilty they ought to be satisfied of his being at the time of his second marriage a subject of Her Majesty resident in Canada, and that he had left Canada with intent to commit the offence; and

Held, that it was incumbent on the Crown to prove these matters.

Quære, per WILSON, C. J., whether the trial should not have been declared a nullity. *Regina v. Pierce*, 226.

CROWN LANDS.

1. *Free Grant and Homestead Act* (R. S. O. ch. 24)—*Locatee—Patentee*—43 Vic. ch. 4 (O.).—*Held*, [reversing the judgment of ROSE, J., at the trial,] that a patentee under the Free Grant and Homestead Act (R. S. O. ch. 24,) who was located before, but whose patent did not issue until after the passing of the Act 43 Vic. ch. 4 (O.), is entitled to his land freed from all reservations and exceptions but those specially contained in the patent, and from the burden and easement of having roads, &c., made upon his land, and timber and logs hauled over it, by any licensee of a timber limit. *Dunkin v. Cockburn*, 254.

2. *Locatee cutting timber for clearing—Timber licensee—R. S. O. ch. 24—43 Vict. ch. 4 (O.).—Damages—Loss of profits.*—Under sec. 10 of R. S. O. ch. 24, as amended by sec. 2 of 43 Vict. ch. 4 (O.), the locatee of land "may cut and use such pine trees as may be necessary for the purpose of building and fencing on the land so located, and may also cut and dispose of all trees required to be removed in the actual clearing of such land for cultivation, but no pine trees (except for the necessary building aforesaid) shall be cut beyond the limit of such actual clearing."

Held, that there was nothing to prevent the locatee cutting, clearing, and cultivating the land in several parcels in various shapes and forms, so long as done in good faith for the

purpose of clearing and cultivating, as was found to be the fact here; it not being necessary that the clearings should be together and contiguous: that the locatee may cut such pine trees necessary for building and fencing wherever he chooses on the land, but they can be only used for such purpose; but when the trees are cut in actual process of clearing for cultivation they may be sold and disposed of.

Trees cut by the locatee in actual process of cultivation were sold to the plaintiff, a mill owner, and were seized by the defendants, the timber licensees, who also had a mill, and were taken by them thereto and cut up into lumber. It was proved that the plaintiff could not get other logs at that season of the year.

Held, CAMERON, C. J., dissenting that the plaintiff was entitled to the loss of profits sustained by him by being deprived of cutting the logs into lumber at his mill. *Cockburn v. The Muskoka Mill and Lumber Company*, 343.

3. *Evidence—Crown patent—Reservation of land covered with water—Application papers in Crown Lands Department.*—On the 10th of January, 1852, the Crown granted lot No. 9 in the 4th concession of the township of Ops, "exclusive of the lands covered by the waters of the Scugog River," which were reserved. An affluent of the Scugog flowed through the said lot and entered that river at the south-west corner of the lot. At and prior to the time of the issue of the patent there was a dam upon the river Scugog, built by the Government, which raised the waters of the river, and penned back those of the affluent, and flooded a portion of the said lot; and those through whom the defendants claimed had

also, for many years prior to the issuing of the patent, with the authority of the Public Works Department, maintained a bracket board one foot high upon the dam, still further flooding the lot to the extent of about four acres. The correspondence and papers in the Crown Lands office shewed that the reservation extended to all the land covered by water as they then existed, "formed by the mill-dam on the river Scugog."

Held, that, in construing the patent, reference might be had to papers in the Crown Lands Office connected with the application for the patent, and that the reservation in the grant covered the land drowned by the waters of the river Scugog and its affluent as backed by the dam with the bracketed boards.—*Brady et al v. Sadler et al.*, 692.

DAMAGES.

To mortgaged land.—See EVIDENCE, 1.

Against Sheriff in replevin.—See REPLEVIN.

See SALE OF GOODS—CROWN LANDS, 2—MUNICIPAL CORPORATIONS, 4—LANDLORD AND TENANT, 2—CARRIERS, 1, 2.

DEED.

1. *Ejectment—Deed, alteration of—Validity—Equitable right to possession—Adding party.*—In an action to recover possession of land it appeared that one of the deeds forming a link in the plaintiff's title had been altered by the grantor's agent under authority of a letter

from the grantor. The alteration consisted in the agent rewriting the first two pages and substituting a new grantee. The letter was not under seal; and the deed was not re-executed or re-delivered by the grantor. The plaintiff proved that he had a good equitable right to possession.

Held, that the deed was void at law; but that the plaintiff was entitled to recover on his equitable title. Leave was also granted to add the owner of the legal estate as plaintiff, if necessary. *Thorne v. Williams*, 577.

2. *Vendor and purchaser—R. S. O. ch. 109—Provision in deed—Lawful issue.*—A deed made by C. G. (mother) to J. H. G. (daughter) just after the latter's marriage, contained the following provisions: "It being hereby declared and agreed that it is intended by this deed to vest in the said J. H. G. life interest and estate in the said land, and at her decease the same is to go to the lawful issue of the said J. H. G., and to be held by them, their heirs and assigns in equal shares," and was executed by both grantor and grantee. No issue were in existence at the date of the deed. Subsequently J. H. G. and her children, with the exception of two, executed a mortgage in fee of the property; of these two, one died in the lifetime of J. H. G., leaving infant children. In an application under the Vendor and Purchaser Act, R. S. O. ch. 109, on a sale by the mortgagee, it was

Held, that that the real design of the grantor and J. H. G., the grantee appearing on the face of the deed, was that only a beneficial life estate should be given to the grantee, and that the beneficial remainder in fee should go to her children;

that each child born while the grantee lived would have a vested right to a share in the property, and that such share would descend to those who died before the grantee; and that such a title could not be forced on a purchaser. *Re Morice and Risbridger*, 640.

DEFAMATION.

1. *Slander—Privilege—Malice—Father and son—Counsel and attorney.*—The defendant's son, alleged to be an infant within twenty-one years of age, was brought before a magistrate charged with assault. The defendant attended before the magistrate. On the plaintiff being called as a witness on the prosecutor's behalf, the defendant objected to his giving evidence, stating that "he," plaintiff, "is a perjurer, he perjured himself three times at Butts's trial before you." There was no evidence to shew that the defendant was acting by and on behalf of his son, with his son's consent, nor was it absolutely proved that the son was a minor.

Held, that the communication was not privileged, and could not be withdrawn from the jury. A nonsuit entered by the learned Judge at the trial was therefore set aside and a new trial directed, with costs to the plaintiff, if he succeeded, but, if not, without costs, unless the parties agreed to the action being dismissed, with costs to be paid by the defendant.

Per CAMERON, C. J.—Under like circumstances a counsel, attorney, or party to the action or proceeding would be privileged; and *Semble*, also, even a stranger when permitted by another to act for him with the magistrate's consent.

Per CAMERON, C. J., also. If the defendant was acting in good faith and without malice, under the belief that it was his duty to inform the magistrate of the witness's bad character, he might have a qualified privilege, but the question of malice would be for the jury. *Cowan v. Landell*, 13.

2. *Slander—Denial of, by pleading—Evidence of privileged occasion—Amendment.*—W. was in the employ of a mining Co., of which L. was president, and had been working in the mining district under an arrangement by which his wife was to draw half his wages at the head quarters of the company (her home). After he ceased to be employed by the company, but while still in the mining district and before he was settled with and his wages paid up, his wife with a companion went to L. to apply for some of her husband's wages, and he replied, "We don't owe him anything now, he stole the boat, the cooking stove, and a lot of other things, and sold them." The Secretary of the company had previously received a letter stating that the plaintiff had done what the defendant said he had. The defendant by his statement of defence denied using the words, and gave evidence to that effect at the trial, but proposed also to give evidence that whatever the words used were, he honestly believed them to be true, and leave was asked to amend by setting this up. The Judge who tried the case, held that the occasion was not privileged, and refused to allow the amendment, and on a motion for a new trial. It was

Held, (reversing the judgment of O'Connor, J.,) that the occasion was privileged, and a new trial was granted to give the plaintiff an op-

portunity to prove malice. *Wells v. Lindop*, 434.

3. *Slander—Privileged communication—Crime.*—The plaintiff had been working for a couple of days for the defendant as a seamstress, when the defendant missed \$11, and so informed plaintiff. She drove plaintiff home that evening, stating she would require her again in a week or so. Next day defendant laid the case before the chief of police, who said plaintiff must have taken the money. The defendant then went to a Mrs. W., for whom she thought the plaintiff was working, and on being informed the plaintiff was not there, asked to see Mrs. W. alone, and said, "I have missed \$5. I went to the chief of police and laid the case before him," and he said "plaintiff had taken the money;" that plaintiff was the only one at defendant's house except defendant's children and sister. Defendant asked what she should do, and asked if she could have the plaintiff arrested. Mrs. W. advised her not to, but to go and see plaintiff. The defendant then went to a Mrs. B. for whom the plaintiff was working, and called plaintiff outside and told her what the chief had said; she then put her hand on plaintiff's shoulder and said, "You did, you must have taken it," and asked her to confess and give back the money, and defendant would give her all her sewing. The plaintiff denied taking the money, and asked to be taken to her father, and defendant drove her to her father's residence. Before doing so Mrs. B. asked plaintiff what was the matter, and plaintiff said that defendant accused her of taking some of her money. Mrs. B. said, that through the door having blown open, she heard the defendant say "You did, you must have," and the door then slammed to. On arrival at her father's, the defendant did not want to go in, but on his pressing her, asking what was the matter between her and plaintiff, defendant informed him she had missed some money, and told him what the chief of police had said. The father asked her if she knew plaintiff's character, and why she should be accused more than defendant's sister. The defendant appeared shocked at the suggestion, and said she would have plaintiff arrested, and the father then said that she would do so on her own responsibility. In an action of slander:

Held, that the action was not maintainable; that the words spoken to the plaintiff's father were privileged, while those heard by Mrs. B. and those spoken to Mrs. W. did not impute any criminal offence. *Gorst v. Barr*, 644.

DEVOLUTION OF ESTATES ACT

See WILL, 5.

DISCHARGE.

See MORTGAGE, 1.

See PRINCIPAL AND SURETY, 3.

DISTRESS.

See LANDLORD AND TENANT, 2.

DIVISIONAL COURT.

Entry of judgment.—*See* PARTY WALL.

that each child born while the grantee lived would have a vested right to a share in the property, and that such share would descend to those who died before the grantee; and that such a title could not be forced on a purchaser. *Re Morice and Risbridger*, 640.

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See BANKRUPTCY AND INSOLVENCY, 1.

See CANADA TEMPERANCE ACT, 1878-6.

DOWER.

See BANKRUPTCY AND INSOLVENCY, 1.

DRAINS.

Injury of workman in—Non-liability for.—*See* MASTER AND SERVANT, 2.

See MUNICIPAL CORPORATIONS, 4.

ESTATE.

Tenant for life—Improvement by—Expropriation of land—Tenant for life accounting for moneys received for land expropriated.—Under the will of W. B. K., his widow E. K. took a life estate in the whole of his real property, and his son W. the remainder in fee. A railway company, after the death of W. B. K., expropriated part of the lands and paid the compensation money to E. K., who had obtained letters of guardianship of her infant children. This money she expended in making improvements on the remaining portion of the lands. After W. attained full age he sold this land, with the improvements on it, E. K. joining in the conveyance in ignorance of her rights to a life estate, and receiving no compensation in respect to it. W. afterwards died intestate, and in taking the accounts in this action as against E. K. in respect to the moneys received by her as above from the railway, the heirs of W. sought to charge E. K. with the

whole of the said money (less the value of her life estate), without regard to the sums spent by her on the improvement of the rest of the land.

Held, that if W. were living and making this claim, E. K. could have answered it by shewing that he had already got the equivalent by the sale of the other property long before the termination of her life estate at a value enhanced by the improvements, and that besides she had released to his purchaser her life estate, which further enhanced the amount of purchase money received by him, and since his heirs (the present claimants) could have no higher claim than he would have had if living, E. K. could answer the claim now made by them in the same way.

E. K. could not be said to occupy the position only of a tenant for life seeking to charge the estate with the value of a permanent improvement made by her, or seeking to charge the remainderman with such value or part it. *Wilson v. Graham*, 661.

By entireties.—*See* WILL, 1.—*Tail.*—*Id.*

Tenancy for life.—*See* WILL, 7.

ESTOPPEL.

Bill of exchange—Forgery—Estoppel by conduct.—Y., who had been in partnership with the defendants, L. and J. M. Y., under the name of the H. C. Co., withdrew from the firm and assumed the position of general manager, but had no power to sign drafts. On 25th June, 1883, Y., for his own private purposes, drew a bill of exchange in defendants' name, on M. & Co., a firm in Montreal, for \$2,760, which was

discounted by the plaintiffs and sent to Montreal. The bill was to mature on 28th September. About 25th August Y. requested the bank to recall the bill, as, he said the company were settling with M. & Co. On the same day Y. wrote defendants informing them of the fact of his having so used their name on the draft, and requesting them to retire and charge the same to his account, stating that as it had been discounted for his own accommodation, and the proceeds applied to his own use, defendant should pay no part of it. On 25th August the defendant L. called at the bank and asked to see the draft, and examined it very critically, and when asked why he did so, said, "J. M. Y.'s signature was not usually so shaky," and that he would call in a day or two to see if the bill were taken up. A few days afterwards J. M. Y. called at the bank and asked to see the bill, and examined it very carefully. The acting manager asked him if he would send a cheque for it, when he answered that it was too late that day, but he would do so next day. No cheque was sent. About the 15th September the acting manager and the bank solicitor called to see J. M. Y., and asked him why he had not sent his cheque, when he replied he did not know, but admitted having promised to do so, and that he thought at the time he would. He refused to say whether the signature was his. Y. subsequently left the country. About the time the draft was returned to the bank, and shewn to L., Y. had a large sum to his credit with the firm, and continued to have, even after the commencement of this action. The Judge at the trial found that the draft was a forgery, and gave judgment for the defendants.

Held, [ROSE, J., dissenting,] that, although the draft was a forgery, the defendants by their conduct were estopped from denying their liability on it.

Per CAMERON, C. J., and GALT, J. There need not be affirmative evidence that by reason of defendants' conduct the plaintiffs were prejudiced by the actual doing of something they would not have done, or refrained from doing something they would have done; but it is sufficient if they can shew in the absence of matter of estoppel that they might have put themselves in a position from which a benefit might accrue to them. It is immaterial whether they would have taken steps to secure the benefits or not. Here the plaintiffs might have arrested Y. for forgery and have sued him for the money obtained, and thereby placed themselves in a better position with regard to Y. than they were afterwards.

Per ROSE, J. There should have been affirmative evidence that the plaintiffs were so prejudiced. *The Merchants Bank v. Lucas et al.*, 520.

See PRINCIPAL AND AGENT—CANADA TEMPERANCE ACT (1878), 8.

EVIDENCE.

1. *Damages to present crop—To farm permanently—Evidence of—Improper rejection—Action by mortgagor—Joinder of mortgagee—O.J.A. s. 17 s-s. 5.*—Plaintiff bought seed barley from defendant, guaranteed to be clean. The seed was sown and it was afterwards discovered that it was mixed with a weed called wild vetches or wild peas, which took root and grew up with the barley.

In an action to recover damages for depreciation in the value of the farm the evidence showed that the plaintiff had not sustained any damage to his crop, but he tendered evidence to shew depreciation in the value of the farm, which the learned Judge refused to receive.

On motion for a new trial.

Held, (reversing the judgment of GALT, J.) the plaintiff should have been allowed to substantiate, if he could that the necessary consequence of sowing the foul seed was to lower appreciably the value of the farm.

On the argument it was contended that as the farm was mortgaged the plaintiff (mortgagor) could not maintain the action.

Held, that in equity the mortgagor is the owner in a case like this where the land is worth considerably more than the mortgage, and it is for the judge to direct the mortgagee to be added as a party or to direct the sum recovered to be paid into Court for his protection if it appears that his interests are being affected prejudicially by the litigation, but it is no reason for dismissing the action, and a new trial was ordered.—*Mc Mullen v. Free*. 57.

Judgment against executor on debt of testator conclusive of indebtedness.]

—See EXECUTORS AND ADMINISTRATORS, 3.

2. *Receipt—Bills of Sale Act—Parol evidence—Admissibility of—Sale of growing timber—Removal within time named.*—A receipt, *qua* receipt, is not a contract, but a mere acknowledgment, and is open to explanation and contradiction by parol.

S. sold all the elm and soft maple trees on a certain lot to T., and at the time of sale gave T. the following

receipt: "Received from J. L. for T., the sum of \$500, on account of elm and soft maple," &c., on the said lot, describing it. Parol evidence was admitted to shew, and the jury found, that "one of the conditions of the sale was that the timber was to be removed by T. within two years."

Held, that the receipt was not the contract between the parties, but a mere acknowledgment of so much money; and therefore the parol evidence was properly admitted.

Held, also that the effect of the condition was that T. was only to have the right to cut and remove the timber within the two years from the date of the agreement.

Johnston v. Shortreed, 12 O. R. 633. followed.

Semble, that a sale of growing timber does not come within the operation of the Bills of Sale and Chattel Mortgage Act. *Steinhoff v. McRae*, 546

See INSURANCE—ESTOPPEL—PARTY WALL—CRIMINAL LAW, 2—WILL, 2—MASTER AND SERVANT, 2—MUNICIPAL CORPORATIONS, 5—LIMITATIONS (STATUTE OF), 2—CANADA TEMPERANCE ACT, 1878, 6, 7, 8—CROWN LANDS, 3.

EXECUTION OF WILL.

See WILL, 3.

EXECUTORS AND ADMINISTRATORS.

1. *Misappropriation—Liability of co-executor—Compensation—Direction in will to erect suitable monument.*—When one of two executors,

who was entitled under the will of his testator to a large sum charged on the real estate, but which could not be considered a legacy or a debt in such a sense that the personal property was the primary fund for the payment of it, had applied in his own business a portion of the personal estate, which was by the will directed to be invested, and which, although large, was not equal in amount to the charge in his favour on the realty, and his co-executor, though aware of such application, had not taken any steps to prevent the same.

Held, that they were both equally liable to account for the whole of the said principal sum and interest, with rests.

Re Crowter, Crowter v. Hinman, 10 O. R. 159, distinguished.

Where the personal estate not specifically bequeathed come to the hands of certain executors and trustees, was \$41,818.99, of which they expended \$25,100.93, and the rents and profits of real estate that came to their hands were \$4,051.90, of which they expended \$3,816.91, and there appeared a large number of items on each side of the account, over 300 on one side, and over 400 on the other, and it appeared that there had been a good deal of labor, care, and trouble in the management of the estate.

Held, that five per cent. on the total sum, thus come to their hands, was not excessive to be allowed as compensation, although \$16,953.05 of the estate moneys remained in their hands with which they were chargeable.

Where a testator provided for the erection "of a suitable tablet" over his grave, "not to exceed \$1,500," and also of monumental tablets or

stones, &c., and the erection thereof over the graves of his deceased wives, and died worth \$200,000, and the executors spent \$3,000 on a monument to him and his wives, removing the remains of the deceased wives to the same burial place as the testator.

Held, that they might properly be allowed the said sum of \$3,000 in their accounts. *Archer et al. v. Severn et al.* 316.

2. *Will—Agreement giving effect to unexecuted will—Deficient estate—Debt due from legatees to testator—Retention by executor—R. S. O. ch. 107, sec. 30—13 Eliz. ch. 5.* I.

R. endorsed notes for the accommodation of J. R. The holders received out of the estate of J. R. after his death 60 cents on the dollar, leaving \$3,500 unpaid. B., the executor of I. R., paid this. I. R., who died January 1st, 1884, left all the residue of her estate, real and personal, to be equally divided, share and share alike, between J. R., J. F., and J. B. Shortly before her death I. R. had another will prepared, but died without executing it. There was a residuary clause in this latter will of all her property, directing a division of it into four equal parts, one share of which was to be given to J. R. On January 4th, 1884, all persons interested in the residuary devised in the will and in the intended will signed a written agreement on the back of the latter, that they accepted the distribution of the estate of I. R. provided for in the latter, in lieu of that contained in any other will, though duly executed. By his own will, executed February 13th, 1884, J. R. directed that the estate of I. R., so far as he was interested therein, should be divided according to the agreement signed by him on January 4th, 1884.

Held, (i) that B., the executor of I. R., had the right to pay or retain out of J. R.'s share of her residuary estate the full balance which he had been obliged to pay on said accommodation notes, although J. R.'s estate was insolvent, and although the accommodation paper in question fell due after I. R.'s death.

R. S. O. ch. 107, sec. 30, abolishing the right of retainer in case of a deficiency of assets, has reference to the debtor's estate, not to the creditor's, and where a legatee is indebted to the testator, the executor may retain the legacy either in part or full satisfaction of the debt by way of set off, and this is not affected by that statute.

(ii) The agreement of January 4th, 1884, was binding on J. R. and was binding on his executor, and could not be impeached by his creditors.

The only possible ground of complaint by creditors was, that this agreement violated 13 Eliz. ch. 5, but that statute is directed against fraudulent alienations of property, whereby the debtor diminishes the estate, and does not touch the case of his neglecting or refusing to enrich himself. *Bain v. Malcolm et al.* 444.

3. *Judgment against executor—Effect as against other creditors—Conclusive evidence of indebtedness—Promissory note—Notice of dishonour—Administration of goods and lands.*—A judgment obtained against an executor upon a debt of the deceased, is conclusive evidence of the indebtedness to the plaintiff as against all other creditors of the deceased, and is so in administration proceedings, though the administration is of goods and lands.

Therefore where a judgment had been obtained against the executor of H. on certain promissory notes endorsed by him and maturing after his death, and upon H.'s estate afterwards being administered by the Court, the judgment creditor brought the judgment into the Master's office and claimed upon it, and other creditors of H. thereupon asked to be allowed to adduce evidence as against the claim, on the ground that no proper notice of dishonour had been sent by the holder of the promissory notes, upon which the judgment had been obtained.

Held, reversing the decision of the Master in Ordinary, that they could not be permitted to do so.

Semble, such a judgment is only *prima facie* evidence against heirs-at-law and devisees of the deceased.

Eccles v. Lowry, 23 Gr. 167, commented on. *Re Hague, Traders Bank v. Murray*, 727.

See MORTGAGE, 1.

Breach of trust by.—*See* WILL, 4.

FIXTURES.

Flooring in Skating Rink.—*See* LANDLORD AND TENANT, 2.

FORECLOSURE.

Rate of interest on mortgage during time allowed to redeem.—*See* MORTGAGE, 2.

FOREIGN LAW.

See CARRIERS, 1.

FORGERY.

See ESTOPPEL—CRIMINAL LAW, 1.

FREE GRANT.

See CROWN LANDS, 1.

HIGH COURT OF JUSTICE.

Its right to interfere with election of officers.—*See* VOTERS' LISTS.

HUSBAND AND WIFE.

C. S. U. C. ch. 73—Wife's after-acquired personal property.—It is evident from the scope of C. S. U. C. ch. 73. that notwithstanding a marriage settlement any separate personal property of a married woman acquired after marriage and not coming under or being affected by such settlement shall be subject to the provisions of the Act in the same manner as if no such settlement had been made, and as to such property the married woman shall be considered as having married without a settlement. *Dawson v. Moffatt et al.*, 170.

IMPROVEMENTS.

By tenant for life.—*See* ESTATE.

See MORTGAGE.

See TAX SALE.

INCUMBENTS

See RECTORY LANDS.

INFANT.

Stockholder in Road Company.—*See* MUNICIPAL CORPORATION, 2.

INFORMATION.

Laid before one Magistrate under Canada Temperance Act, 1878, bad.—*See* CANADA TEMPERANCE ACT, 1878, 1.

INJUNCTION.

Statutory remedy for penalty—Relief by injunction.—On a motion by a road company for an injunction to restrain the defendant from passing through their toll-gates without paying tolls when demanded, it was contended that because there was a statutory remedy for the recovery of a penalty for each offence under sec. 129, of R. S. O. ch. 152, the Court would not interfere by way of injunction.

Held, that as the plaintiffs had established a *prima facie* case in regard to the rights they claimed, there was jurisdiction to interfere by way of injunction pending the determination of the question at the trial and an injunction was granted, upon a consideration of the balance of convenience, in favour of the plaintiffs. *Letten v. Goodden*, L. R. 2 Eq. 125, and *Cory v. Yarmouth, &c., R. W. Co.*, 3 Ha. 596, considered and followed. *The Hamilton and Milton Road Co. v. Raspberry*, 466.

INSOLVENCY.

Of Stockbrokers, and sale of seats of, at stock exchange.—*See* STOCK EXCHANGE.

INSURANCE (FIRE.)

1. *Mutual company—Further subsequent assurance—Assent.*—To an action on a fire policy in a mutual insurance company, the defend-

ants set up as a defence the eighth statutory condition, that the company were not to be liable for any loss "if any subsequent insurance be effected in any other way, unless and until the company assents thereto by writing, signed by a duly authorized agent." By 44 Vic.ch, 20, sec. 28(O.), the Fire Insurance Policy Act is made applicable to mutual fire companies, except where the provisions of the Mutual Act are inconsistent with, or supplementary, or in addition thereto. Sec. 39 of the Mutual Act enacts, in substance, that if a double insurance subsists in defendants' company and another company, the defendants' policy should be void, unless such double insurance subsists with the directors' assent endorsed on the policy, signed by the secretary, &c., or otherwise acknowledged in writing; and sec. 40, that whenever the company receives notification in writing of an additional sum being assessed on the same property in another company, the same shall be deemed assented to unless the company within two weeks after the receipt of such notice signify their dissent in writing. The defendants' policy was effected on the 31st July, 1884. On 4th January, 1886, the plaintiff effected a further insurance in another company for \$1,000. On 8th March, 1886, the plaintiff wrote defendants: "I hereby notify you that I have put a second insurance on my stock and farm implements." On 10th March the defendants replied, informing plaintiff that he had not "given the number of the policy or the amount of the insurance, or the name of the company." The plaintiff did not reply to this, because, as he said, he was away from home. The loss occurred on the 16th March. The jury found that the plaintiff did not, within a rea-

sonable time after effecting the further insurance, notify the defendants, but that the notice was reasonably sufficient as far as he knew.

Held, that under sec. 39 the insurance was void; and that, under the circumstances, there could be no implied assent under sec. 40; and further, that the notice was not sufficient.

Per GALT, J.—The insurance was also avoided under the eighth statutory condition; and if sec. 40 could be held to be supplementary thereto, the plaintiff, by reason of the defective notice, did not come within it. *Graham v. The London Mutual Fire Insurance Company*, 132.

2. *Amount of loss—Goods destroyed—Evidence—Proofs of loss, sufficiency of—R. S. O. c. 162, sec. 2—Without prejudice—Action prematurely brought.*]—Action on a policy of insurance against fire on a stock of goods. M., the local agent, through whom the insurance was effected, stated that he had at the time examined the premises, and considered, from the size of the store, the appearance of the goods, and the stock book, there were goods to the amount insured. The fire occurred on the 20th October, and all the goods on the premises were destroyed. On the same day the defendant's inspector came and saw plaintiff, who furnished him with a statement shewing the amount of the stock in May—the insurance having been effected in June—the sales since then, and the invoices of good purchased up to the fire. The inspector gave plaintiff a form from which he was to, and did fill in, the proof papers sent him by the inspector; and which plaintiff enclosed to defendant in a letter of 27th October, informing them that, if not correct, he would

have same made out to their satisfaction. On 31st October defendants replied that they thought the loss, in place of \$13,005, the amount claimed by plaintiff, should be \$11,734.90; adding: "This sum, we consider, not only reasonable, but liberal, and which we are liable for, without any prejudice to or waiver of, any condition of the policy." The plaintiff replied that his claim was a just and honest one, but if settled at once he would accept a deduction of \$400. The defendants then wrote that theirs was a fair and liberal offer, and pointed what they considered objectionable items in plaintiff's claim. The plaintiff then made and sent to defendants a statutory declaration of loss according to the above form. The defendants then replied, stating that without admitting, but denying any liability, they drew attention to alleged informalities in not specifying the items of loss in detail, and in not giving a detailed statement of the claim. The plaintiff then furnished defendants with a statutory declaration giving such detailed statement. Nothing further was done and this action was brought. The defendant set up a number of defences, amongst which was arson, and imputing fraud and misconduct to the plaintiff, but no evidence was given in support of them.

Held, there was sufficient evidence of the amount of the goods at the time the insurance was affected; that the goods insured were those destroyed by the fire; and that under sec. 2. of the Fire Insurance Policy Act, R. S. O. ch. 162, no objection could be raised to the proofs; and in any event the proofs were sufficient.

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Held, also, that the letter of the 31st October was properly admitted in evidence, for it was not stated to be without prejudice generally, nor was any objection taken to its reception at the trial, the defendants by the letter merely claiming that it should not be deemed a waiver of any condition of the policy, and both parties acted on this view.

It was objected that the action was premature, because, by a condition of the policy sixty days was given for the payment of a claim, and the action was brought within such period; but *held*, that as the policy herein was only subject to the statutory conditions by which the period is thirty days, the objection could not be sustained. *Hartney v. The North British Fire Insurance Company*, 581.

INTEREST.

During period allowed to redeem.]—*See* MORTGAGE, 2.

Rule as to in bankruptcy.]—*See* LIMITATIONS (STATUTE OF), 2.

Allowed to executor.]—*See* WILL, 4.

See PRINCIPAL AND SURETY, 3.

JUDGMENT.

Against insolvent, after assignment, in action to which assignee not party, not evidence against latter.]—*See* LIMITATIONS (STATUTE OF), 2.

Against executor upon debt of testator.]—*See* EXECUTORS AND ADMINISTRATORS, 3.

JOINT CONTRACTORS.

See **PRINCIPAL AND SURETY**, 3.

JURISDICTION.

See **VOTERS' LISTS—CANADA TEMPERANCE ACT**, 1878, 2, 4, 6, 7, 9—**PRACTICE**.

JURY.

Findings of jury in answer to questions—R. S. O. ch. 50, s. 264—Recommendation of verdict—Entry of verdict by Judge on findings.—In an action for wrongful dismissal the jury found (1) That there was a final bargain made between the parties; (2) That the plaintiff was to get \$900 a year; and in answer to the question, "It being a condition of the bargain that the plaintiff's term of service should end if he was not fit to do the duties of a captain, was the plaintiff fit to do the duties of a captain?" (3) "It has not been satisfactorily shewn by the evidence," and (4) The plaintiff was dismissed, and added as a rider the following, "Your jury, believing that the plaintiff did not receive proper aid in the discharge of his duty, would recommend a verdict for plaintiff of \$100." The Judge entered a verdict for the defendants, and the plaintiff moved to set it aside.

The Court being evenly divided, the motion to set aside the verdict was dismissed.

Per **BOYD, C.**—The onus was on the defendants to prove the unfitness, and the jury, as is manifest by their recommendation, did not intend to pronounce against the plaintiff's competency. The findings were left in too uncertain a state to enter a ver-

dict for either party against the will of the other. No material part of what the jury returns to the Judge should be disregarded.

Per **PROUDFOOT, J.**—The duty of the jury was completed when they answered the questions. It was for the Judge to determine what the legal result of the answers was. The jury's recommendation would rather seem to have been done more from sympathy for the plaintiff than with the desire of affirming his competency, which they had previously found was not proved. *St. Denis v. Baxter et al.*, 41.

See **PRINCIPAL AND SURETY**, 1.

See **BANKRUPTCY AND INSOLVENCY**, 1.

LANDLORD AND TENANT.

1. *Lessor and lessee—Erection of buildings by lessee—Covenant by lessor to pay for, not running with land—Land or devisees of lessor not liable for value of buildings.*—*Held*, that a covenant by a lessor (not mentioning assigns), to pay for buildings to be erected on the lands demised did not run with the land, and that the lessee or his assigns had no claim as against the land or the devisees of the lessor in respect of the value of buildings so erected. *McClary et al v. Elizabeth Jackson et al*, 310.

2. *Illegal distress—Notice of distress—Appraisement—Tender—Authority of bailiff—Damages—Fixtures.*—On a distress for rent no notice thereof in writing was given to the lessee; nor a legal appraisement made before sale; and the actual value of the goods sold was much greater than the amount due for rent.

Held, that the distress was illegal.

In proof of an alleged tender to the bailiff, the plaintiff said that he asked the bailiff for a bill of demands, with all costs, and he would pay him: that he, plaintiff, had then \$87 in his hand, which was sufficient to pay the rent and costs, and said, "Here is your money," but that the bailiff refused to receive it. This was denied by the bailiff; but the question was left to the jury, who found that there was a tender. The goods distrained were afterwards sold by the bailiff.

Held, that on the evidence the finding of the jury could not be interfered with, and there must be held to have been a tender to the bailiff; and that the landlord was responsible for the bailiff's act. *Matheson v. Kelly*, 24 C. P. 508, distinguished.

Held, also, that by reason of the illegal distress the plaintiff would be entitled to recover as damages the difference between the goods and the rent due; but as the sale was after the tender, the plaintiff could recover the full value of the goods.

Quære, whether the plaintiff here, the proprietor of a skating rink, was a person engaged in trade, so as to make fixtures used in his business exempt from distress.

Under the particular circumstances herein, a hardwood flooring, put down specially for skating, and capable of removal, was held to be a tenant fixture, and exempt from distress. There was no finding by the jury that the flooring should be restored in the same plight as before distress; but in view of the finding of the tender having been made, this was not material.

Held, also, that on the evidence there was no abandonment of the

premises by the plaintiff, nor were the damages found excessive.

H., who was the president of the defendants, an incorporated company, and also a member of an incorporated gas company, purchased the goods at the sale for the gas company. The Judge at the trial charged the jury, that H. was both seller and buyer, and that the sale was void.

Held, a misdirection; but, as it appeared that no substantial wrong or miscarriage was occasioned thereby, the Court, under Rule 311, O. J. A., could not interfere. *Howell v. The Listowell Rink and Park Company et al.*, 476.

LAW SOCIETY.

Practising without certificate of.] —See SOLICITOR.

LIMITATIONS (STATUTE OF).

1. *Trustee and cestui trust—Principal and agent.*]—J.C. died in 1876, and left an estate very much embarrassed to his wife, the plaintiff. B., an active business man, acted as agent for the plaintiff in settling up the estate, and induced the creditors generally to give up their claims or settled them on terms favourable to the plaintiff. He also sold a house, part of the estate, for her, and a portion of the purchase money was taken in the notes of F., the purchaser. The notes came to the hands of S., a brother of the plaintiff, who held them and collected some of them for her. Some little time after B. asked S. if the notes were all paid, and when he was told some of them were not, he stated that the money for a loan to F. was then going through his hands, and if

he had the notes he could collect them, and so "save them for the widow and orphans out of that money." The notes were given to him and he collected them, but the money was not paid over by him but remained unclaimed for eight years until he made an assignment for the benefit of creditors.

In an action against him and his assignees, in which the defendants set up the Statute of Limitations as a bar, and the plaintiff contended that B. was a trustee under an express trust, and that the statute could not be pleaded,

Held, by CAMERON, C. J. C. P. D., (at the trial) that B. received the notes as agent of the plaintiff for the purpose of collecting the money as agent of the plaintiff, and that the statute was a bar. There was no express trust, but only such a trust as arose from the relation of principal and agent, which did not prevent the operation of the statute.

On appeal the Divisional Court was evenly divided, and this judgment was affirmed.

Per BOYD, C.—B. undertook to hold the notes, not for safe custody as a deposit, nor for investment as a scrivener, but as an attorney or agent to collect and remit. This established a fiduciary relationship, but not that of a trustee and *cestui que trust* to all intents. A breach of trust arose on B.'s part when he failed to remit and kept the money an unreasonable time, which indicated his intention to convert it to his own use. From the time plaintiff knew or might have known that they were at arms length the retention was an *adverse* possession. Plaintiff's duty then was to make him pay as a debtor, and if she failed to resort to the usual remedy

within six years, he had the right to plead the statute. *Cook v. Grant*, 32 C. P. 511, distinguished.

Per PROUDFOOT, J.—The deposit and the undertaking was an entire single transaction, and a trust attached upon the notes given to B.; they were not to become his property: special confidence was reposed in him to secure their payment out of an entirely distinct transaction, and to save them for the widow and orphans: the trust continued until the completion of the transaction by the money being placed in the widow's hands; the notes were not due when confided to B. He was not a mere agent to collect, but he was to use an influence to get better security or anticipated payment. *Cook v. Grant*, *supra*, considered. *Coyne v. Broddy, et al.*, 173.

2. *Assignment for benefit of creditors — Judgment against assignor after assignment—Proof of claim—Statute of Limitations—Balancing of accounts—Payments on account—Appropriation of payments—Interest.* —S. was an assignee for the benefit of creditors of J. E., and G. was similarly assignee of E. H. E. Before the assignments J. was a creditor of E. H. E. for money lent and as holder of certain notes. After the assignment S. obtained a judgment against E. H. E., but G. refused to recognise S. as a creditor on E. H. E.'s estate by virtue of the judgment. S. then brought an action against G. for an account of G.'s dealings with the estate of E. H. E., and for payment of the judgment. G. set up the Statute of Limitations. On a reference to a Master he found: (1) That the judgment was an answer to the defence of the Statute of Limitations. (2) That there had been a balancing of accounts between J. E.

and E. H. E. as to the account before E. H. E.'s assignment and as to the notes after E. H. E.'s assignment, and that each balancing of accounts was such a balancing as prevented the operation of the Statute of Limitations. (3) That before the assignments and within six years of action brought E. H. E. paid several sums to J. E. on general account, and that such payments as far as the general account outside of the notes was concerned prevented the operation of the Statute of Limitations. (4) That E. H. E. agreed to pay interest to J. E., and he allowed it to him. (5) That he disallowed some of the items of the judgment as not having been proved outside of the judgment. (6) That he disallowed certain sums of money omitted from the plaintiff's claim, although proved to his satisfaction, as outside the scope of the reference.

On an appeal from the Master it was

Held, That the judgment recovered against E. H. E. after his assignment in an action to which G. was not a party was not even *prima facie* evidence against G.—*Eccles v. Lowry*, 23 Gr. 167, considered.

That the balancing of accounts, before the assignments, upon the general account, and also the payments on account were sufficient to prevent the operation of the Statute.

That the balancing of accounts, after the assignments, as to the notes, did not prevent the operation of the Statute.

That by reason of the payments made on general account being appropriated to the account of the whole indebtedness, including the notes, the latter were not barred by the Statute.

That the interest was properly allowed, as it was included in the bal-

ancing of accounts and the notes were payable with interest.

The rule in bankruptcy, that interest should not be allowed after the date of the commission, does not apply in the case of voluntary assignments for the benefit of creditors. *Stewart v. Gage*, 458.

3. *Administration proceedings—Statute of Limitations—Champertous agreement.*—O. brought in a claim in certain administration proceedings on promissory notes assigned to him by H. & Co., under an agreement between them, which, however, was held void for champerty, and O.'s claim on the notes disallowed. O. thereupon redelivered the notes to H. & Co. The six years allowed by the Statute of Limitations had expired before the notes were thus delivered to H. & Co., but not before the date of the administration order, nor before O. tried to prove them in the administration proceedings.

Held, that the order for administration prevented the bar of the Statute of Limitations.

Held, also, that H. & Co. might now assert their title to the notes, and prove on them, notwithstanding the former champertous agreement with O. *Re Cannon—Oates v. Cannon*, 705.

LIMITATION.

Of action for injury sustained on railway.—See RAILWAYS AND RAILWAY COMPANIES.

LIVERY STABLES.

Licensing of.—See MUNICIPAL CORPORATIONS, 6.

LOCATEE.

See CROWN LANDS, 2.

MALICE.

See PLEADING.

See DEFAMATION, 2.

MAINTENANCE.

Of illegitimate child.—*See* BASTARD.

MALICIOUS PROSECUTION.

Absence of allegation of malice.—*See* PLEADING.

MARRIAGE SETTLEMENT.

See HUSBAND AND WIFE.

MASTER IN CHAMBERS.

See PRACTICE.

MASTER AND SERVANT.

Negligence—Foreman and fellow-servant.—The plaintiff having had years of experience in running iron work machines, and having been previously employed by the defendants in their wood working manufactory, hired a second time, and was injured in working a jointer which he was told other men had been injured at. In an action against his employers

Held, that plaintiff knew from his own inspection and experience that

the machine was dangerous, that it needed caution and firmness in operating; that the risks were open to his observation, and that his opportunities and means of judging of the danger were at least as good as those of his employers, and a motion to set aside a nonsuit entered at the trial was dismissed.

Negligence on the part of a manager or foreman is not constructive negligence on the part of the master. Actual personal negligence of the master must be established, as a foreman is but a fellow servant, though it may be of a higher grade. *Rudd v. Bell et al.*, 47.

2. *Municipal corporation—Contract for construction of sewer—Contractor and sub-contractor—Master and servant—Interference by corporation inspector—Joint wrongdoers—Liability—Compensation.* The corporation of the city of Ottawa contracted with defendant Doyle to lay down sewer pipes on certain streets in the city of Ottawa, and by their engineer and inspector the corporation exercised superintendence over the work as it progressed.

Doyle employed one McCallum to engage workmen and oversee the work. McCallum engaged Murphy, the husband of the plaintiff.

During the progress of the work the sides of the sewer caved in through the faulty and negligent shoring of the walls thereof, thereby causing the death of Murphy.

Held, that, under the evidence, the corporation were not liable: that no recovery ought to have been had against either of the defendants, as there was no evidence from which it could have been reasonably inferred that the deceased was ignorant of the dangerous character of the work he was engaged in, of which he had

quite as much knowledge and means of knowledge as his master, and with the knowledge of which he voluntarily engaged in it; but as defendant Doyle had not moved against the verdict found against him, it was therefore allowed to stand.

Held, also, that the corporation, by their inspector, had not so interfered with the conduct of the work by the deceased as to assume personal control over the deceased within *Stephen v. The Commissioners of Police of Thurso*, 3, Court of Session Cases, 4th Series, 235, per Gifford, L. J.

Held, also, that the action being founded on the relationship of master and servant, both defendants could not be held liable, and that the plaintiff, by retaining her judgment against Doyle, had elected to treat the wrongful act or omission as his, and had therefore no recourse against the corporation. *Murphy v. The Corporation of the City of Ottawa and Daniel Doyle*, 334.

See MUNICIPAL CORPORATIONS, 3.

MECHANIC'S LIEN.

Time of filing lien as between material-man and owner.]—When a contractor working for several owners has but a single contract for the supply of materials with the material-man, the time of filing a lien by the latter against an owner is not to be measured with reference to the duration of deliveries under the contract between the material-man and the contractor, but by the completion of the work by the contractor for several owners. *Re Moorehouse and Leak*, 290.

Summary trial of issue as to, in discretion of Judge.]—See PRACTICE.

Jurisdiction of Master in Chambers to amend registry of.]—See PRACTICE.

MISDIRECTION.

Buyer and seller.]—See LANDLORD AND TENANT, 2—PARTY WALL—CRIMINAL LAW, 2—BANKRUPTCY AND INSOLVENCY, 1.

MISREPRESENTATION.

See PRINCIPAL AND SURETY, 1.

MORTGAGOR.

Right to sue for damages to land mortgaged.]—See EVIDENCE, 1.

MORTGAGE.

1. *Mortgage by executor to co-executor—Death of mortgagee—Discharge by mortgagor as surviving executor—Validity of discharge—Improvements under mistake of title.*]—The Rev. W. H. died leaving F. H. and W. H. his executors, who both proved the will. F. H. on January 17, 1874, mortgaged certain lands to W. H. his co-executor, to secure certain moneys due by F. H. to the estate of Rev. W. H., both mortgagor and mortgagee being described as executors of that estate. Interest was paid on that mortgage up to April 1st, 1885. The executor, W. H., died intestate in July, 1879. On April 10, 1884, F. H. sold the lands to M. and on same day executed a discharge of his own mortgage which was registered April 15, 1884, in which the mortgage was misdescribed as if it had been taken to the Rev. W. H.

In an action by the plaintiff who had been appointed by an order of Court to represent the estate of Rev. W. H. on the mortgage, against several defendants who had become owners of the land, in which the defendants contended that the discharge of F. H. was valid and claimed for their improvements under mistake of title, it was.

Held, That the mortgage was not discharged, nor the estate reconveyed to F. H. by what was done, and that the legal effect of the mortgage was to enable W. H. to hold the estate in his own right as against F. H., although as regards the beneficiaries under the Rev. W. H.'s will W. H. was only a trustee. R. S. O. ch. 111, section 67, contemplates the action of two parties one to pay and the other to receive, and not both represented by one, and that one whose duty and interest were in direct conflict, and under these circumstances such a transaction could not stand.

The defendants had actual notice, by the registered discharge, that F. H., as surviving executor of the Rev. W. H., was attempting to deal with himself as mortgagee, and it was at their peril they took such a title without satisfying themselves there was a satisfaction and discharge of the mortgage moneys as regards the persons entitled under Rev. W. H.'s will. But a reference was ordered as to improvements under mistake of title.

Bacon v. Shier, 16 Gr. 485, considered and distinguished. *Beaty Shaw et al.*, 21.

2. *Mortgage—Foreclosure—Rate of interest for time given for redemption.*—In proceedings to foreclose a mortgage on which the principal money had become due by default

being made in the payment of interest, although the time for which the mortgage was made had not arrived,

Held, that the rate of interest for the six months allowed to redeem should be computed at the same rate as the mortgage provided for, which in this case seemed a reasonable rate. *Muttlebury v. Stevens*, 29.

3. *Mortgagor and Mortgagee—Solicitor acting for both—Authority to receive mortgage money.*—M. applied to McM., a solicitor, for a loan of \$6,200 on his land. McM. got P. to advance the money. He then drew the mortgage, which was executed by M. and wife and left with him till P. came to pay the money. P. subsequently called on McM. and upon his registering and delivering over the mortgage paid the money. McM. after this told M. on his calling on 6th March that P. had not as yet been able to get the money, and on M. stating he required \$400 at once McM. gave him his own cheque for that amount. M. swore this was a loan and was subsequently repaid. On 2nd April McM. absconded without having accounted for the \$6,000. After his departure two receipts were found among his papers, signed by M., and dated March 6, for \$400 and \$89.36, respectively, as money received from McM. on account of the P. mortgage, and a memo. from which it appeared that \$205.55 had been paid out of the mortgage money by McM. to discharge execution debts of M.'s which he had instructed McM. to settle.

Held, [in this affirming the judgment of Proudfoot, J.], that it must be shewn that either express or implied authority had been given McM. by M. to receive the money to justify P.'s paying it to him; that his possession of the mortgage with an

indorsed receipt did not give such authority ; but [in this reversing the judgment of Proudfoot, J.], that there was evidence of authority to receive to his own use, out of the mortgage money when paid, the above three sums, sufficient to entitle P. to hold the mortgage as a security to that extent. *McMullen v. Polley*, 299.

See EVIDENCE, 1.—See WILL, 5.

MORTMAIN.

See WILL, 6.

MUNICIPAL CORPORATIONS.

1. *Negligence — Accident occurring prior to organization of municipality*—49 Vic. ch. 55 (O.) *Non-liability—Pleading.* To an action by plaintiff against defendants for an accident to plaintiff on 11th April, 1886, caused by slipping on a sidewalk of defendants "covered with snow and ice, negligently allowed to accumulate thereon by defendants, and being otherwise defective and negligently out of repair for a long time, to the defendant's knowledge, and which it was their duty to keep in repair," defendants pleaded that the village had not at the date of the accident been organized according to the terms of 49 Vic. ch. 55, incorporating said village, and could not have any officers or servants, and could not be and was not guilty of negligence by reason of anything done or omitted previous to or at the said date of the alleged accident.

Held, on demurrer, a good defence. *Simpson v. The Corporation of the Village of Huntsville*, 101.

2. *By-law, illegality of—Sale by one road company to another—Defective organization of purchasing company — Minority of corporator — Abortive sale.*—The H. and M. Road Co., the owners of a certain road, and in possession thereof as a toll road, levying and collecting tolls thereon, assumed to sell the road to the H. and F. Road Co., who entered into possession thereof. Subsequently it was held by the Court of Appeal, on appeal from the judgment of Wilson, C. J., that the H. and F. Road Co. were not duly incorporated, because, while the Joint Stock Companies Act, R. S. O. ch. 152, requires at least five corporators to enable a company to be incorporated, there were not five here, one of the alleged incorporators being a minor. The corporation of the township of East Flamborough thereupon passed a by-law assuming possession of the road.

Held, that the by-law was illegal, and must be quashed ; that the effect of the judgment of the Court of Appeal was to restore to the applicants the franchise they held before the abortive sale took place, the road having been kept alive as a toll road, and repaired as such from time to time, and nothing having transpired to justify the municipal corporation in interfering with the road, or assuming possession and control of it, as the by-law authorized them to do. *In re The Hamilton and Milton Road Company v. The Corporation of the Township of East Flamborough*, 128.

3. *Action against—Negligence of employee—Course of employment—Corporation not liable.*—In an action for damages for injury caused by negligent driving, it appeared

that a servant of defendants on his way for a wrench, for which he had been sent for the purpose of shutting off the water from a street hydrant which had burst, without the knowledge or consent of defendants, wrongfully took possession of a horse and buggy belonging to defendants' city commissioner, and therewith ran plaintiff down, causing the injury complained of.

Held, that defendants were not liable. *Stretton v. The City of Toronto*, 139.

4. *Connecting private drain with public drain—Authority of corporation—Damages—Liability.*—The plaintiffs owned and occupied a house and premises which had been drained by a drain running through private grounds to and under a raceway, which the owners of the lands on the other side thereof on which the water flowed had stopped up. On the east side of the street on which plaintiff's house was, there was an open ditch or drain connecting with the raceway, which at first was no higher than the street, but being afterwards banked up, the flow of the water was stopped and was spread over the adjoining lands. R., the then owner of plaintiffs' land, and others interested, petitioned the council to construct a drain under the raceway, which the corporation did by means of a well at the raceway and a five-inch pipe under it. R. then connected his private drain with the well. The defendants afterwards connected the drainage of other streets with the well, whereby more water was brought down to the well than the five-inch pipe would carry off, and it flowed back on the plaintiffs' premises, which were damaged. There was no authority given from the defendants

to use the well, and the only evidence of acquiescence was the knowledge by O., defendants' street inspector, and no objection made by him.

Held, following *McConkey v. Corporation of Brockville*, 11 O. R. 322, the defendants were not liable for the damage sustained by the plaintiffs. *Welsh et ux v. The Corporation of the City of St. Catharines*, 369.

5. *Municipal corporation—By-law—Contract—Novation—Meeting of Councillors—Taking possession of building—Acceptance of work on executed contract—Liability of corporation.* The defendants passed a by-law, approved of by the ratepayers, reciting that there was "an urgent necessity for a building to be used by the municipal corporation as a lock-up, fire-hall, council chamber, and public hall," for the purpose of acquiring the land and erecting such a building at a cost of \$4,500, for the raising of which sum, provision was therein made. B.'s tender for carpenter work, &c., (including a shingle roof) was accepted, but at a special meeting of the council at which only three of the councillors, with B. and L. the plaintiff, were present, an arrangement was made by which B. threw off \$4 a square, and was relieved of the roof part of his contract, and L. agreed to put on a metallic roof at \$6 a square, and it was resolved by the council that "the iron shingles instead of wooden shingles be put up on the roof of the new town hall." All this was done subject to the approval of the Reeve who was not present, but who afterwards approved of it, and at whose instance L. ordered the material and did the work. L. received a payment on account, but on the dis-

covery of some defects in B.'s work, the defendants refused, although they had taken possession of the building, to pay the balance, on the ground that the roof was not properly done, and that L. was a sub-contractor under B., and that there was no contract under seal with him.

Held, (affirming the judgment of O'Connor, J.), that the legal effect of this was to consummate a tripartite agreement, by which B. was to give up part of his contract, and L. was to do the work for a specified price: that between the plaintiff L., the defendants and B. there was a novation of contract, so far as the roof was concerned, and as to that L. became the principal and only contractor.

Held, also, that the taking possession, payment on account, &c., was sufficient evidence to justify a finding of an acceptance of the work as an executed contract, or a case "of an actual and *de facto* performance of the contract by one party of which the other party has taken, received and enjoyed the benefit." *The Mayor, &c., of Kidderminster v. Hardwick*, L. R. 9 Ex. 18, cited; *Munro v. Butt*, 8 E. & B. 738, distinguished.

A municipal corporation is liable on an executed contract for work done by its order, on its behalf and for its benefit, though there be no agreement under seal, if the thing done were urgently required for the purpose of the corporation, and especially so where the price to be paid is not of large amount: *Robins v. Brockton*, 7 O. R. 481, referred to. *Lawrence v. The Corporation of the Village of Lucknow*, 421.

6. *Municipal law — Livery stable*—Power to regulate and license in cities having police commissioners—49 Vic. ch. 37, sec. 9 (O.)—*Ultra*

vires.]—The board of police commissioners in cities is the body which alone has the power, under 49 Vic. ch. 37, sec. 9 (O.), to regulate and license livery stables, and this power includes the power to declare in what localities such stables shall be allowed; therefore, a by-law passed by the corporation of the City of Toronto, a city having a police board, assuming to declare it unlawful for any person to establish or keep such stable unless he shall have procured the consent of the majority of owners and lessees of property situate within the area of 500 feet of such stable, was *held ultra vires*.

Even if not *ultra vires* the by-law would have been objectionable in requiring, as a condition precedent to the granting of the license, that an applicant should procure the consent of a number of persons in the neighbourhood. *Re Kiely*, 451.

See MASTER AND SERVANT, 2.

MUTUAL INSURANCE.

See INSURANCE, 1.

NEGLIGENCE.

See MASTER AND SERVANT, 1—MUNICIPAL CORPORATIONS, 1, 3.

NOTICE.

To heir, who was also devisee, of conditions of will.]—See WILL, 2.

NOVATION.

See MUNICIPAL CORPORATIONS, 5.

NULLITY.

See CRIMINAL LAW, 2.

ONTARIO JUDICATURE ACT.

Equitable issues triable by jury.—
See BANKRUPTCY AND INSOLVENCY, 1.

PAROL EVIDENCE.

See EVIDENCE, 2.

PARTIES.

See RECEIVER—DEED, 1.

PARTY WALL.

Evidence — User — Agreement — Landlord and tenant — Jury — Divisional Court entering judgment.—
The plaintiffs claimed that the wall between theirs and the defendant's buildings was a party wall: that defendant had, without plaintiffs' consent, raised it a foot above the plaintiffs' premises, and altered the roof from a flat to a slanting one, whereby water was discharged on the plaintiffs' premises and injured them, for which they claimed damages; and also asked for a declaration that the wall was a party wall: that defendant should be restrained from preventing plaintiffs from using the wall, together with the new part, on payment by plaintiffs of half the cost thereof, and also from allowing the water to be discharged on plaintiffs' premises. The wall was proved to be wholly on the defendant's land. The part constituting the cellar foundation projected some seven inches,

upon which the plaintiffs had rested the joists of their building in the cellar, the joists of the upper floors being let into the wall. The jury found that the wall was a party wall, and that the plaintiffs had sustained \$35 damages. Judgment was entered for the plaintiffs, and a decree made as asked.

Held, on motion to the Divisional Court, that the wall was not a party wall, nor was there any evidence from which a grant of, or the right to use a part thereof, could be presumed: that it was misdirection in the learned Judge to tell the jury that the user of the said wall for the said purposes for over twenty years constituted it a party wall, for at most it would merely give an easement for such purposes. This, however, was not in question, as plaintiffs' claim was not to continue such use, but to extend it: and that there was also misdirection in stating that the defendant would be bound by any arrangement made between the plaintiffs' predecessors in title and the tenant of the defendant's predecessors in title under a twenty years building lease, and whereby the lessor, at the expiration of the term, took the buildings at valuation, for there was nothing to shew that the defendant's predecessors were parties to the arrangement.

Held, also, that this being a case which before the O. J. Act would have been in the sole jurisdiction of the Court of Chancery to grant the relief asked, the Divisional Court could act without the intervention of a second jury; and, the evidence failing to establish the plaintiff's right to the relief asked for, the decree was set aside; but as to the damages, as they had not been moved against, they were not interfered with. *James et al. v. Clement*, 115.

PLEADING.

Averment of malice—Implied malice—Reasonable and probable cause of belief of larger amount due.]—Y. issued a capias before judgment against V. and had him arrested. After the arrest V. tendered \$90 in full of Y.'s claim, which was refused as not being sufficient. Y. then proceeded with his action, but failed to obtain a judgment for more than \$90.

In an action by V. against Y., claiming damages for wrongful arrest, in which no malice was alleged,

Held, on demurrer, that malice would not be inferred, because so far as appeared from the pleadings Y. had reasonable and probable cause for thinking that V. owed him more than \$90, and as malice was not alleged, the demurrer must be allowed with costs. *Vandervoort v. Youker*, 417.

See MUNICIPAL CORPORATIONS, 1 —BASTARD.

POLICE COMMISSIONERS.

Sole power to license livery stables.]—*See* MUNICIPAL CORPORATIONS, 6.

POLICE MAGISTRATE.

See CANADA TEMPERANCE ACT, 1878, 4, 9.

PRACTICE.

Mechanic's lien—R. S. O. ch. 120.]—The Master in Chambers has jurisdiction to entertain a motion under R. S. O. ch. 120, sec. 23, to annul the registry of a mechanic's lien when the

amount in question is over \$200. *Re Cornish*, 6 O. R. 259, followed.

The question whether an issue as to a mechanic's lien should be summarily tried or not rests largely, if not entirely, in the discretion of the Judge. *Re Moorehouse and Leak*, 290.

See CANADA TEMPERANCE ACT, 1878, 6.

PREFERENCE.

See BANKRUPTCY AND INSOLVENCY, 1.

PRINCIPAL AND AGENT.

Claim for commission—Equitable estoppel—Rule 321 O. J. A.]—

The defendants, type founders in Edinburgh, employed plaintiff's father as their agent in Canada, to be paid by a commission "on the receipts, i. e. in cash, bills, and value of old metal received." He also had a small guaranteed salary. It was understood that as soon as the father got too old to manage the business the plaintiff was to succeed him; and in 1880 this was effected. In 1882 the plaintiff was dismissed. He wrote complaining thereof, but said the sting was taken out of it by reason of a yearly allowance to the father of \$1,250, for which he was grateful. In January, 1884, the defendants, annoyed at a loss occasioned by plaintiff's brother, threatened that the father's allowance would be stopped; and the father wrote plaintiff that he could make any claim he wished. The plaintiff then made a claim on defendants, being for commission on sales, made before, but the amount thereof was received after plaintiff had

left defendants' employment. On defendants notifying the plaintiff that if the claim were pressed the father's allowance would be discontinued, nothing further was done by plaintiff until after his father's death when the claim was pressed and this action commenced. It appeared that had the claim been pressed the allowance would have been stopped, and that the defendants paid the allowance under the belief that the claim would not be pressed.

Held, that the plaintiff was not entitled to recover.

Per ROSE, J. The plaintiff was equitably estopped from maintaining the action.

Per CAMERON, C. J.—The plaintiff by the expressed terms of the contract was only entitled to commission on moneys received during his employment and not afterwards. *Palmer v. Miller et al.*, 567.

Right to recover on equitable title]
—*See* DEED, 1.

See CARRIERS, 1.

See LIMITATIONS (STATUTE OF), 1.

PRINCIPAL AND SURETY.

Representation on which bond executed—Jury findings.—The defendant agreed to become surety with McG. to the plaintiffs. Plaintiffs' solicitor sent two bonds to their agent for execution, one by defendant, the other by McG. The agent attended defendant to get his bond executed, and in answer to a remark of defendants (made before he signed the bond), that McG. had promised to sign a bond too, told him that a

bond had been sent up to be signed by McG. Defendant then signed the bond, but McG. subsequently refused to sign his.

The jury found a statement was made leading defendant to suppose that the bond executed was conditional upon the execution of the proposed bond from McG., and that its execution was obtained by a false, although unintentionally so, representation.

Held, (affirming the judgment of O'CONNOR, J.,) that the plaintiffs could not recover. *The Toronto Brewing and Malting Company v. Hevey*, 64.

2. *Change in position of principal debtor—Release of sureties—Renunciation clause—Sureties undertaking to be liable as principals—Joint contractors.*—Where an alteration is made in the contract of suretyship, then, unless it is without enquiry self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not go into an enquiry or permit the question to be submitted to the jury, but will hold that the surety must be the sole judge as to whether he will remain liable notwithstanding the alteration.

A bond made by defendants as sureties, and B. as principal, to the plaintiffs, to secure the faithful and diligent performance of B.'s duties, including the payment over of moneys, recited that B had been appointed agent for the plaintiffs for the Province of Ontario, and as such was to discharge certain duties, and to receive certain moneys, as defined in the instrument appointing him, and as to which the parties thereby declared they had due and sufficient communication. The condition of the bond was for the performance of

such duties, and the payment over of such moneys. The bond also contained the following clause: "The said sureties, in consideration of the premises, hereby agree to * * renounce to (*sic*) the benefits of division, discussion, and all other benefits of sureties, consenting to be bound as fully in all respects as the said principal party." The instrument of appointment provided that B. should be general agent for the province, should have control over all local agents, except some six, including those of Hamilton and Galt, and his compensation should be a commission of 35 per cent. on all business obtained by himself or the said agents under his control, he to pay the agents thereout, and on renewals 30 per cent.; and also to have a salary of \$75 a month, which was to include travelling expenses. The plaintiffs afterwards added Hamilton and Galt to his agencies. Subsequently B.'s business was confined to Toronto, and he agreed to relinquish his commission on the outside agencies; and it was intimated to him that at the close of the year his salary would have to be rearranged.

Held, that the taking away of the outside agencies was such a change in B.'s position as could not be said to be without enquiry, evidently unsubstantial and not prejudicial to the sureties, and would of itself discharge them; but as to Galt and Hamilton it could not be said, on the evidence, to have that effect.

Held, also, that the effect of the renunciation clause was to place the principal and sureties in the position of joint contractors: that the agreement confining B.'s business to Toronto amounted to a new contract; and that the sureties would be only

liable as principals for default up to the date thereof, and not thereafter. *Citizens Insurance Company v. Cluxton*, 382.

3. *Guarantee—Sureties by independent contracts—Contribution—Discharge—Joint sureties—Co-sureties—Application of payments—Interest.*]—The C. company and D., by separate independent contracts, guaranteed to the plaintiffs the good conduct in office of B. their city chamberlain, who was afterwards guilty of misconduct within the guarantees. The guarantee of the C. company contained a proviso that as against every person then being or thereafter becoming security or surety for the said B. as aforesaid, the C. company should have and possess the right of rateable contribution and all other the rights and remedies, both legal and equitable, of co-sureties. The scope of D.'s guarantee included, and was more extensive than that of the guarantee of the C. company. The plaintiffs now sued the C. company on their guarantee, who, as a defence, set up that the plaintiffs had discharged D. from liability under his policy, and that this also discharged them.

Held, that even if the plaintiffs had so discharged D., this operated only to release the C. company to the extent to which they would have had a right of contribution from D., and that they would have been discharged to this extent as a matter of equity, independently of their contract.

The C. company and D. could not be considered in any sense joint contractors or joint sureties.

Ward v. The National Bank of New Zealand, 8 App. Cas. 755, followed.

Soon after B.'s defalcations were discovered he died, and after his death his executrix handed over certain of his property to a trustee, who was also an officer of the plaintiffs, to realize and apply the money therefrom towards satisfying B.'s defalcations, but without indicating to what part of such defalcations it should be applied. The trustee applied it towards satisfaction of the earlier of B.'s liabilities, in respect to which the defendants were not liable, since by a condition of their policy they were not liable except for losses occurring within a year before notice of claim made to them.

Held, that the case was similar to payment made by a debtor to a creditor without express appropriation, in which case the creditor could appropriate it, and the defendants had no right to complain of the appropriation made in this case.

Held, also, that the defendants should pay interest on the amount due from them from three months after the proofs of loss were delivered. *The Corporation of the City of London v. Citizens Insurance Company*, 713.

PRIVILEGE.

Of father, where not shown acting for son at trial.—See DEFAMATION, 1.

See DEFAMATION, 2, 3.

PROHIBITION.

See VOTERS' LISTS.

RAILWAYS AND RAILWAY COMPANIES.

Accident—Limitation of action—C. S. C. ch. 66, sec. 83; 42 Vic. ch. 9, sec. 27 (D.)—R. S. O. ch. 128, sec. 5.—On 10th May, 1879, O. was seated in a car of the C. V. R. Co. standing on the railway of that company, when an engine of the defendants ran upon the railway of the C. V. R. Co., through gross negligence, as alleged, and collided with the car in which C. was. He was injured in the collision, and died on the 11th August, 1885, as alleged, from the injuries thus received. On 4th August, 1886, his executrix brought an action therefor.

Held, on demurrer, that the action was for injury sustained "by reason of the railway," and that the limitation of six months, provided by sec. 83 of C. S. C. ch. 66—sec. 27 of 42 Vic. ch. 9 (D.)—applied and prevailed over the limitation of twelve months provided for by sec. 5 of R. S. O. ch. 128, and therefore the action was barred. *Conger v. The Grand Trunk Railway Company*, 160.

See CARRIERS, 1, 2.

RECEIVER.

Right of action—Adding party—Amendment.—A receiver has no right to sue in his own name for a debt due to the person or corporation whose assets he has been appointed to receive; nor can that right be conferred on him by order. But where by an *ex parte* order made in the action in which the plaintiff was appointed receiver, he was authorized to bring actions in his own name for the collection of debts

due to a certain Grange, and brought this action pursuant thereto, it was

Held, that an amendment should be made adding the Grange as co-plaintiffs without security being given for their costs, they being insolvent.

If there were no person in whose name the action could be brought, there would perhaps be jurisdiction to direct it to be brought in the name of the receiver. *McGinn v. Fretts*, 699.

RECEIPT.

Not a contract.]—See EVIDENCE, 2.

RECTORY LANDS.

St. James's Rectory, Toronto—*Imperial Stat.* 31 Geo. III. ch. 31, sec. 38—*Endowment of rectory with lands*—*City rectory*—*Township rectory*—*Sale of lands under 29 and 30 Vic. ch. 16*—*Distribution under 41 Vic. ch. 69, (O.)*—*City incumbents*—*Township incumbents*—*Who entitled to participate.*]—The Church of St. James was erected into a rectory "at the city of Toronto, within the said township, (York)," by patent under 31 Geo. III. ch. 31, sec. 38, in 1836, and was endowed at different times with lands situate, some in the city of Toronto, and some in the township of York.

When the lands were sold under 29 & 30 Vic. ch. 16, and the proceeds had to be distributed by the Synod of Toronto under 41 Vic. ch. 69 (O.), there were incumbents of parishes in the city of Toronto and in the township of York, and it was contended that only the incumbents of the city parishes were entitled to participate in the distribution.

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On a special case being stated for the opinion of the Court, it was *Held*, that the city of Toronto was, for the purpose of the grant erecting the rectory to be considered as being within and a part of the territory of the township of York, and the grant was for the benefit of both the township and the city as one territory, and that the incumbents of the churches in the township must, under 41 Vic. ch. 69, sec. 2, be included among the participants in the fund.

Semble, there would appear to have been no authority for the creation of a rectory in this province other than a rectory for a township. *The Incorporated Synod of the Diocese of Toronto v. Lewis et al.*, 738.

REGISTRATION.

Mechanic's Lien may be annulled by Master in Chambers.]—See PRACTICE,

REPLEVIN.

Action against sheriff for taking insufficient bond—*Damages recoverable therein*—*R. S. O. ch. 53, sec. 11.*]

—*Held*, that it is the sheriff's duty in replevin to take a bond with two sureties, and to use due care and to exercise a reasonable discretion in inquiring into the sufficiency of the sureties, and that when he had failed to do this, and the owner of the goods replevied, and the bailiff (defendants to the replevin suit,) which had resulted in their favour) brought an action against him for damages consequent thereon, they were entitled to recover all such damages as naturally flowed to them from his wrongful act, viz., the rent in arrear, the costs of distress and

of the replevin suit, and of an action against the principal and sureties on the replevin bond and incidental thereto, provided the same did not exceed the penalty named in the bond; and that the defendant could not excuse himself by shewing that the plaintiff in replevin and one of the sureties was worth the amount of the penalty of the bond at the time it was taken. *Norman et. al. v. Hope*, 556.

REPUBLICATION OF WILL

By codicil.—See WILL, 6.

RESCISSION.

See SALE OF LAND.

RESTRICTION.

On alienation.—See WILL, 1.

ROAD COMPANY.

Right to injunction to restrain passing through toll gates.—See INJUNCTION.

Defective organization of.—See MUNICIPAL CORPORATIONS, 2.

SALE OF GOODS.

Bills of exchange given for price—Recovery on—Total failure of consideration—Counterclaim—Evidence of damages.—The defendant ordered a quantity of boots from plaintiff at Montreal, through G., plaintiff's agent, who shewed defendant samples, some being known in the trade

as "solid leather," and others as "shoddy." The defendant said he bought what was represented as solid leather, while G. said he sold by sample, and that the boots were in accordance therewith. The order was given in September, and parts delivered respectively in October and November, and the balance somewhat later. The defendant said he complained, in October, and again some three weeks later, to G. of the quality of the boots, and that he would ship them back, when G. told him to do so. The defendant said he shewed G. a pair of the boots which had turned out badly, and G. said as he was going to Montreal he would shew them to the plaintiff. On G.'s return he told defendant that if there were any more like that to send them all back. In January the defendant went to Montreal and asked for an extension of time for payment, to see if the goods turned out all right, which the plaintiff refused to give, when defendant said if they did not turn out right he would return them. The boots were taken into stock and a large quantity sold; but a few pairs were returned. In February the defendant claimed to be entitled to return the boots as not answering the contract. There was no evidence to shew what defendant's loss was; and the whole evidence was conflicting. It was urged that the defect was a latent one, and therefore not discoverable by ordinary inspection and examination. The defendant accepted four bills of exchange in payment of the price, one of which he paid after maturity. In an action on the other three the defendant denied his liability thereon, and also counterclaimed for damages. The learned Judge at the trial found for the plaintiff on the bills, and dismissed

the counterclaim, without prejudice to the defendant bringing a fresh action for damages.

Held, that the finding as to the bills was correct, as there was unquestionably a good consideration therefor, and defendant's remedy, if any, must be on his counterclaim; but, in the absence of any evidence of loss, there could be no judgment thereon; and also, if the Judge at the trial had decided on the conflicting evidence, the Court might not be able to interfere. The right, however, conceded, of bringing a fresh action, placed the defendant in as favorable position as he could expect. *Leggatt v. Clarry*, 105.

SALE OF LAND.

Recovery of purchase money—Independent agreements—Specific performance—Rescission.—On the 5th of June the plaintiff executed an agreement whereby he agreed to purchase from defendant a lot in Winnipeg at and for the sum that might be placed thereon by D., provided that if the price exceeded \$6,000, the excess should be secured by the plaintiff by mortgage on the property; the sum so fixed to be paid by the plaintiff "deeding to the defendant his interest in certain lots in Toronto. On the same day defendant executed an agreement whereby he agreed to purchase the plaintiff's interest in Toronto lots for \$6,000, the defendant to pay the interest and taxes to date, but to deduct same out of the \$6,000. The Toronto property was conveyed to the defendant who entered into possession and paid off the mortgages on it. The defendant refused to convey the Winnipeg

property except for \$8,000, at which sum he contended D. had valued same, but the evidence shewed that D. had declined to make any valuation. The defendant also refused to appoint another valuator. In an action to recover from defendant the sum of \$6,000, the plaintiff intimated he would accept a conveyance of the Winnipeg property in settlement of his claim on defendant paying the costs.

Held, that unless defendant accepted the offer, then there should be judgment for the plaintiff for the \$6,000, less \$838.28 paid for interest and taxes.

Seemle, that the two agreements must be deemed to be independent.

Held, also, that this was not a case for specific performance, nor for rescission. *Proctor v. Mulligan*, 683.

SEARCH WARRANT.

Justices ordered to pay costs.—*See CANADA TEMPERANCE ACT*, 1878, 3.

Bad, because issued by one Justice only.—*Ib.*

SEDUCTION.

Right of mother and step-father to maintain action when daughter not living with plaintiffs.—In an action for seduction brought by the mother and step-father of the daughter, it appeared at the time of the seduction the daughter was not living at home with the plaintiffs, but was out at service.

Held, (affirming the judgment of GALT, J.) that the plaintiffs had the right to maintain the action.

Quere, as to the mother's right to sue alone. *Meyer et al. v. Bell*, 35.

SHERIFF.

Duty in replevin.]—See REPLEVIN.

SHIPS AND SHIPPING.

British ship—Alien mortgagee—Imperial Statute, 17 and 18 Vic. ch. 104.]—The mortgagee of a British ship is not an owner within the meaning of Imperial Statute 17 and 18 Vic. ch. 104, and there is no provision in that statute to prevent an alien being a mortgagee. *Comstock v. Harris*, 407.

SKATING RINK.

Whether a proprietor of, is a person engaged in trade.]—See LANDLORD AND TENANT, 2.

SLANDER.

See DEFAMATION, 1, 2, 3.

SOLICITOR.

Law Society certificate—Omission to take out—Use of name by firm of practising solicitors—Suspension—Penalty—R. S. O. ch. 140.]—A solicitor who allows his name to be held out to the world as a member of a firm of solicitors, although not a partner in respect of the profits of the firm, is a practising solicitor within the meaning of R. S. O. ch. 140. *M.*, a solicitor of the Court, allowed his name to be used by the

firm of "M. M. & B." in the usual advertisements and business cards of the firm, and on all proceedings in the Courts the firm name of M. M. & B. was endorsed. *M.* however did not participate in the profits of the firm :

Held, notwithstanding, that he was liable to be suspended for practising without taking out the usual annual certificate issued by the Law Society, and to the penalties imposed by the statute.

ARMOUR, J., dissenting. *Re Hon. Wm. Macdougall*, 204.

Privilege of, in action for defamation.]—See DEFAMATION, 1.

Acting for both mortgagor and mortgagee.]—See MORTGAGE, 3.

Authority to receive money.]—See MORTGAGE, 3.

SPECIFIC PERFORMANCE.

1. *Omission to tender deed for execution—Dispensing with tender—Specific performance—Judicature Act, sec. 16, sub-sec. 8.*]—The general scope of the Judicature Act, and especially sec. 16, sub-sec. 8, requires that the matters in controversy between the parties may be completely and finally determined, and multiplicity of legal proceedings concerning such matters avoided; so that, whenever a subject of controversy arises in an action, the Court should, if possible, determine it so as to prevent further and useless litigation.

In an action for the specific performance of an agreement to convey land, the defendant set up as a defence that there was no tender of a deed for execution before action commenced; but at the same time

indicated that if there had been a tender it would have been refused.

Held, that though, in strictness, there should have been a tender, yet, under the circumstances, it should be dispensed with, and judgment was entered for the plaintiffs. *McDougall et al. v. Hall*, 166.

See SALE OF LAND.

STOCK EXCHANGE.

Toronto Stock Exchange—Insolvency of member—Sale of seat—Distribution of proceeds—Preference of Stock Exchange creditors.]—F. & L., brokers in partnership, were both members of the Toronto Stock Exchange, being each the owner of one seat at the board. They assigned to the plaintiff in December, 1884. The Toronto Stock Exchange by their by-laws provided that in the case of a member becoming insolvent and not procuring a release from his creditors within a named period, the Exchange should have power to realize the seats by sale, and the proceeds in such case were to be applied, first, in payment of fines and dues to the Exchange; secondly, in payment of claims arising out of Stock Exchange transactions of creditors, being members of the Exchange; and thirdly, the balance, if any, to be paid to the insolvent, or his legal representative. The seats of F. & L. were sold under the by-laws of the Exchange and the proceeds remained in the hands of the Exchange. Certain members of the Toronto Stock Exchange, claiming to be creditors of F. & L. prior to their insolvency, for debts arising out of Stock Exchange transactions, filed claims under the by-laws prior to the sale

of the seats. The plaintiff on the other hand claimed to be entitled to the seats and to the moneys arising from their sale under the assignment to him for the benefit of creditors. All parties concurred in the sale of the seats, subject to their respective rights. This action was brought by the plaintiff, as assignee for the benefit of creditors of F. & L., against the Toronto Stock Exchange for payment to him of the money realized from the sale of the seats:

Held, 1. That it was competent for the Toronto Stock Exchange to pass the by-laws in question giving the preference to the claims of the Exchange, and to claims of members of the Exchange for debts arising out of Stock Exchange transactions. 2. That the plaintiff was the legal representative of the insolvents and entitled to the payment to him of the balance of the moneys arising from the sale of the said seats after payment of fines and fees due to the Exchange and claims of creditors, members of the Exchange, arising out of Stock Exchange transactions. 3. Reversing the judgment of GALT, J., dismissing the action, that as the by-laws of the Exchange did not provide any means for ascertaining or deciding a contest as to what deductions might properly be made from the proceeds of the sale of the said seats that it was proper to refer this matter for enquiry to the Master. *Clarkson v. The Toronto Stock Exchange*, 213.

STATUTES.

13 Eliz. c. 5.]—See EXECUTORS AND ADMINISTRATORS, 2.

17 & 18 Vic. ch. 104 (*Imp.*)—See SHIPS AND SHIPPING.

Con. Stats. C. ch. 66, sec. 83.]—See RAILWAYS AND RAILWAY COMPANIES.

Con. Stats. U. C. ch. 73.]—See HUSBAND AND WIFE.

32-33 Vic. ch. 19, sec. 45. (D.)—See CRIMINAL LAW, 1.

32-33 Vic. ch. 20, sec. 58. (D.)—See CRIMINAL LAW, 2.

32-33 Vic. ch. 31, sec. 15. (D.)—See CAN. TEMP. ACT. 1878, 5.

32-33 Vic. ch. 31, sec. 46. (D.)—See CAN. TEMP. ACT, 1878, 2.

38 Vic. ch. 75. (O.)—See WILL, 6.

R. S. O. ch. 24.]—See CROWN LANDS, 1.

R. S. O. ch. 50.]—See ARBITRATION AND AWARD.

R. S. O. ch. 50, s. 254.]—See JURY.

R. S. O. ch. 53, s. 11.]—See REPLEVIN.

R. S. O. ch. 95, s. 4.—See TAX SALE.

R. S. O. ch. 106, ss. 36, 37.]—See WILL, 5.

R. S. O. ch. 106, sec. 26.]—See WILL, 7.

R. S. O. ch. 107, s. 30.]—See EXECUTORS AND ADMINISTRATORS, 2.

R. S. O. ch. 109.]—See DEED 2.

R. S. O. ch. 111, sec. 67.]—See MORTGAGE, 1.

R. S. O. ch. 118.]—See BANKRUPTCY AND INSOLVENCY.

R. S. O. ch. 120, sec. 23.]—See PRACTICE.

R. S. O. ch. 128, sec. 5.]—See RAILWAYS AND RAILWAY COS.

R. S. O. ch. 131, sec. 1.]—See BASTARD.

R. S. O. ch. 140.]—See SOLICITOR.

R. S. O. ch. 162.]—See INSURANCE, 2.

R. S. O. ch. 180, secs. 109, 150, 155, 159.]—See TAX SALE.

R. S. O. ch. 216. (O.)—See WILL, 6.

41 Vic. ch. 16 (D.)—See CAN. TEMP. ACT, 6.

41 Vic. ch. 69, sec. 2. (O.)—See RECTORY LANDS.

41 Vic. ch. 16, ss. 99, 100, 103, 108, 109, 111, 119, 123. See CAN. TEMP. ACT, 1878, 1, 2, 3, 4, 5, 6, 7, 8, 9.

42 Vic. ch. 9, sec. 17. (D.)—See CARRIERS, 2.

42 Vic. ch. 9, sec. 27. (D.)—See RAILWAYS AND RAILWAY COS.

43 Vic. ch. 4. (O.)—See CROWN LANDS.

48 Vic. ch. 26, sec. 2. (O.)—See BANKRUPTCY AND INSOLVENCY, 1, 3.

49 Vic. ch. 22. (O.)—See WILL, 5.

49 Vic. ch. 55 (O.)—See MUNICIPAL CORPORATIONS, 1.

49 Vic. ch. 37, sec. 9. (O.)—See MUNICIPAL CORPORATIONS, 6.

O. J. A. s. 16, sub-s. 8.]—See SPECIFIC PERFORMANCE.

O. J. A. s. 17. sub-s 5.]—See EVIDENCE, 1.

SURETY.

See PRINCIPAL AND SURETY, 1, 2, 3.

TAXES.

See COMPENSATION.

See TAX SALE.

TAX SALE.

Cash sale—Advertisement of sale—Disadvantageous sale—Notice to owner—Compensation for improvements—R. S. O. ch. 180, secs. 109, 150, 155, 159—R. S. O. ch. 95, sec. 4.—At a sale of part of a certain lot for taxes the treasurer, who made the sale, marked in the sale book the part sold as the south one-tenth, but afterwards gave a certificate for the north one-tenth, and this was finally conveyed to the defendant on December 5, 1884; the bid was for one-tenth of an acre only.

Held, that the above state of facts did not invalidate the tax sale and the title of the defendant to the north one-tenth.

Held, also, that neither did the fact that the purchase money was not paid for a week or two after the sale invalidate it.

It appeared that in the advertisement of the sale it was not stated whether the land was patented or unpatented.

Held, that R. S. O. ch. 180, secs. 150, 155 did not cure this defect.

Again, the part sold, the north one-tenth, was not the least disadvantageous to the owner, the southern boundary of it running through a house which was on the lot, leaving about four feet on the unsold portion.

Held, that on this ground the sale could not be sustained.

Again, though the owner of the land was known, he was not notified as required by R. S. O. ch. 180, sec. 109, of the assessment and liability to sell,

Held, that this was also an omission which was not cured by R. S. O. ch. 180, sec. 155.

Held, also, that the defendant was entitled under R. S. O. ch. 95, sec. 4, though not under R. S. O. ch. 180, sec. 159, to compensation

for improvements to the land under mistake of title, and also to be paid the amount paid for taxes, interest and expenses. *Haisley v. Somers*, 600.

TENANT FOR LIFE.

Accounting for money.—See ESTATE.

TENDER.

See SPECIFIC PERFORMANCE.

TIMBER.

Sale of growing timber not within Bills of Sale and Chattel Mortgage Act.—See EVIDENCE, 2.

TOLLS.

Injunction to restrain from passing through toll-gates without paying.—See INJUNCTION.

TRUSTS AND TRUSTEES.

See LIMITATIONS (STATUTE OF), 1.

Breach of trust.—See WILL, 4.

ULTRA VIRES.

See MUNICIPAL CORPORATIONS, 6.
—BANKRUPTCY AND INSOLVENCY 3.

USER.

See PARTY WALL.

VENDOR AND PURCHASER.

See COMPENSATION.—DEED, 2.

VERDICT.

See JURY.

VOTERS' LISTS.

Voters' List Act—Order for holding Court before expiration of thirty days allowed for appeals—Jurisdiction—Prohibition—High Court—Power to interfere.—The voters' lists for the city of St. Thomas were posted up in the office of the city clerk, on 23rd October, 1886. On 19th November, three days before the time for giving, by a voter, notice of any complaint against the list, had expired, the clerk made a report to the County Judge in the form No. 7 in the Schedule to the Voters' list Act, R. S. O. ch. 9; and the said Judge thereupon, on said 19th November, made an order appointing the 30th November, 1886, for the holding of a Court to hear complaints of errors and omissions in the said voters' lists, and notice of the time and place thereof was duly published in a newspaper published in said city. Previous to the 19th November notice of a number of complaints and omissions in the list was given to the clerk. On an application for a writ of prohibition to prohibit the County Judge from holding the Court, on the ground that he had no jurisdiction to make the order, inasmuch as the thirty days for filing appeals had not then expired.

Held, that the County Court Judge had jurisdiction to make the order, and the application was therefore refused, with costs.

Per CAMERON, C. J.—The appeal or complaint, made within the thirty days after the clerk had posted the voters' list, would be in time, and

should be disposed of, whether made after the order for holding the Court or not; but *quære*, could the Judge deal with such appeals on the 30th November Court?

Per CAMERON, C. J.—*Quære*, also whether this Court has the right to interfere with election officers, except where express statutory power to do so is given.

Per ROSS, J.—Under the Voters' List Act the Judge is not confined by the report of the clerk, but may and should hear all appeals. *Re Alexander Boyes*, 3.

WILL.

1. *Life estate by entireties—Estate tail—Mortgage.*—The testatrix by her will devised lot 15 to her son A. P. and his wife M. P., "and to their children and children's children for ever. . . Provided always that the aforesaid A. P. and M. P. shall not be at liberty, at any time, or for any purpose, to convey or dispose of the said lands, as it is my will that the same be entailed for the benefit of their children." The testatrix then devised all the rest and residue of her estate to M. P. "to have and to hold the same to her and her heirs," &c., "to her and their use and behoof forever?" After the death of the testatrix A. P. and M. P. mortgaged lot 15 to the plaintiffs by a mortgage in fee simple.

Held, taking the whole of the will together, that A. P. and M. P. took an estate for life by entireties in lot 15, and their children an estate tail in severalty.

Held, also, that the said will did not contain such a restriction on alienation as to make the mortgage void; but that it was a valid charge for

the lives of M. P. and A. P., and the survivors of them. *The Peterborough Real Estate Investment Company (Limited) v. Patterson et al.*, 142.

2. *Conditions precedent and subsequent—Validity of—Notice of contents of will.*—Testator, after granting to his wife a life estate in certain land, devised the same to his son, subject to the following conditions:

"First, that he abstain totally from intoxicating liquors and card playing.

"Second, that he be kind and obedient to his mother.

"Third, that he be known among his friends as an industrious man ten years after the death of his mother.

"Should he fulfil these above-mentioned conditions, I give and devise to him, to hold to his heirs and assigns forever, the said lot. Should my son Michael not fill to the letter these conditions, then he shall have no right or title to the use of the said property during or after his mother's lifetime; but I will and bequeath said half lot to my grandson J., to hold to his heirs and assigns forever."

Held, (1) that the three conditions were conditions precedent up to the time of the mother's death, and that conditions one and three were conditions subsequent for ten years after the mother's death.

2. That either the use of intoxicating liquors or the playing of cards would be a breach of the first condition.

3. That the first condition was valid and was not too vague or indefinite for trial or adjudication by the Court; and having been broken, the son's title failed in so far as the condition was precedent, and was for-

feited in so far as the condition was subsequent.

Semble, that conditions two and three were valid, and not too vague or indefinite for trial or adjudication by the Court.

Held, also, that although the son was one of the heirs-at-law, it was not necessary to shew that he had notice of the will or the conditions in it, for he had possession of the land as devisee under the will from his mother's death until his own. *Michael Jordan et al., Executor and Executrix of the Last Will and Testament of Michael Dunn, deceased, v. James Dunn and The Ontario Loan and Debenture Co.*, 267.

3. *Acknowledgment of signature by testator—Validity of execution.*—A testator brought his will, which had been previously signed by him to two persons to sign as witnesses. The witnesses signed in the testator's presence, at his request, and in the presence of each other; and they either saw or had the opportunity of seeing the testator's signature.

Held, that the will was validly executed. *Scott v. Scott*, 551.

4. *Executor—Investment—Breach of trust.*—G. lent money to W. on his promissory note, and when he died held such note as a security. By his will he directed his executors to get in the moneys outstanding and invest the same in such stocks as they might deem advisable. C., the executor who proved the will, left the loan outstanding on the note, and at a subsequent time renewed it and took a new note made by the firm of W. Bros., of which W. was a member. The reason this was done, as stated by G., was because he could get $7\frac{1}{2}$ per cent. interest for the estate, which was more than he could

have done if he had invested in stocks. W. Bros. afterwards became insolvent, and the amount of the note was lost to the estate. It was shown that the executor was advised not to invest in stocks. In taking the accounts in the Master's office, it was held that the amount of the note should not be charged against him personally; but on appeal it was

Held, that it was a very obvious case of breach of trust which could not be excused, whatever might be the hardship resulting to the executor. Interest was allowed to him, however, at the increased rate from the date at which he was charged with the note, and it was directed that interest should not be charged against him at six per cent, if it was proved that he could not have invested in stocks to realize that rate. *Re Gabourie; Casey v. Gabourie*, 633.

5. *Devolution of Estates Act—Locke King's Act—Mortgaged land*—49 Vic. ch. 22—R. S. O. ch. 166, secs. 36, 37.]—The Devolution of Estates Act, 49 Vict. ch. 21, has not superseded, but is to be read in conjunction with R. S. O. ch. 106, secs. 36, 37, and mortgaged land devised by will is primarily liable to pay its own burdens, unless the will otherwise directs by such terms as distinctly and unmistakably refer to or describe the mortgage debts.

Held, that the fact that of two lots owned by the testator, subject to encumbrances, he devised one to his son D., while the other passed under a general devise to the executors in trust for the heirs-at-law, afforded no indication of intention that D. should enjoy free from the mortgage debt, nor did the fact that the testator directed his debts to be paid out of a mixed fund. *Mason v. Mason*, 727.

6. *Republication of will by codicil—Mortmain*—R. S. O. ch. 216—38 Vic. ch. 75 (O.)—A testator made his will, dated February 2nd, 1884, in which was contained the following devise: "To the congregation of Burns Church * *

I bequeath the sum of \$2,000 to be used by the trustees of the said Church towards the purpose of purchasing land for a glebe in any place that they may judge suitable, and for erecting thereon a manse, all for the use of the said congregation through their trustees forever." He added two codicils on September 21st, and December 5th, 1885, respectively, not varying the above bequest, but confirming his will, and died on the 27th of December, following.

Held, reversing the decision of Ferguson, J., that the fact of the codicils having been executed within six months of the testator's death did not, in the absence of anything in them revoking the charitable gift, render it void under R. S. O. ch. 216, or 38 Vic. ch. 75 (O). *Holmes et al v. Murray et al*, 756.

7. *Construction—Passing of after-acquired property—Devise of estate by name—Subsequent additions—Completion of building commenced by testator*—R. S. O. ch. 106, sec. 26.]—J. C. devised to J. B., G. E. S., and J. F. D. all his property and effects, real, personal and mixed, upon trust, (after reciting that his intention was to make provision for his daughter E. M. C., and to do it in such a way that the administration of the fund thereafter provided, should be controlled by the trustees of his will), to hold that part of "my property known as 'Walkerfield,' being the property I now reside upon, containing fifty acres more or less, until the same shall be sold by them

as hereinafter provided, for the use and behoof of my daughter E. M. C., so long as she may desire that the same should remain unsold, and should she desire the same to be sold, then to hold the proceeds of the same upon the same trusts and for the same purposes as hereinafter set directed, with regard to the sum of \$40,000 hereinafter directed to be apart." He then directed his trustees to set apart the sum of \$40,000 to be held by them upon certain trusts, and also a certain further sum to provide an annuity of \$1,200 for his wife, and provided that after the said two funds should have been set apart, the residuary estate should be divided among his nephews and nieces; and lastly, he gave to his trustees "full and absolute power to sell and dispose of all his lands ('Walkerfield,' if sold in my daughter's lifetime, to be sold with her consent only), at such time or times, and in such manner as to them may seem best."

The will was made on September 16th, 1879; and J. C. died December 18th, 1885. After making the will, on June 27th, 1883, J. C. purchased five acres, and on September 21st, 1883, another five acres, forming a block of ten acres, of which one corner nearly coincided with one extremity of a diagonal of 'Walkerfield.' On November 22nd, 1884, he sold a piece of about three and one-third acres of 'Walkerfield.'

In his lifetime J. C. entered into a contract in writing for the erection of a dwelling-house on 'Walkerfield,'

which was not completed at his death, and since his death the executor had paid to the contractor and architects certain sums in respect to it.

Held, affirming the decision of PROUDFOOT, J., that the ten acres subsequently purchased passed under the devise of 'Walkerfield.'

Per BOYD, C.—The word "now," in the devise of 'Walkerfield,' which I now reside upon, should not be allowed to control the other parts of the will, and is not sufficient to oust the effect of the statute by virtue of which the will is to speak from the death.

Held, per PROUDFOOT, J., that the daughter E. M. C. was tenant for life of 'Wakefield,' and after the death the children took the proceeds of sale as she might appoint, and in default of appointment equally, and in default of children, the residuary legatees took.

Held, also, per PROUDFOOT, J., that the funds to build the house must come out of the residue. *Haltou et al. v. Bertram et al.*, 766.

WITNESSES AND EVIDENCE.

Defendant compellable to give evidence, though criminatory. — See CANADA TEMPERANCE ACT, 1878, 6.

WORDS (MEANING OF.)

"By reason of the Railway." — See RAILWAYS AND RAILWAY COS.

v

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